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Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

GORDON B. SAUCERMAN; JOE BENJAMIN; SHARRON BENJAMIN; CLEO FREEMAN,

Petitioners,

v.

GALE NORTON, Secretary of the Interior; KEVIN GOVER, Assistant Secretary for Indian Affairs; ELUID MARTINEZ, Commissioner of Reclamation; WAYNE NORDWALL, Phoenix Area Director for Bureau of Indian Affairs; JANET WONG, Staff Solicitor; WAYNE SUMATZKUKU, Bureau of Indian Affairs Realty Specialist; WILLIAM TITCHYWY, ALLEN ANSPACH; CHEMEHUEVI TRIBAL COUNCIL; ROBERT MOELLER; EDWARD SMITH; DAVID CHAVEZ;; CHEMEHUEVI TRIBAL COUNCIL; DAVID CHAVEZ; EDWARD SMITH; ROBERT MOELLER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Does the "Indian exception" to the Quiet Title Act divest the federal court of subject matter jurisdiction to determine the land status element of *Montana v. United States*, 450 U.S. 544 (1981), as the Ninth Circuit has ruled or is the exception not applicable to a determination of land status as held by the Tenth Circuit in *State of Kansas v. United States, et al.*, 249 F. 3d 1212 (10th Cir. 2001)?

Does a Solicitor's Opinion that the Secretary of the Interior has the discretionary authority to restore "equitable title" to the shoreline of Lake Havasu to the Chemehuevi Indian Tribe create a "colorable claim" in the United States that defeats judicial review of the laws and administrative actions which are the basis of its claim?

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the Ninth Circuit Court of Appeals in this case.

OPINIONS BELOW

On November 19, 2002, the Ninth Circuit Court of Appeals entered its unpublished opinion affirming the District Court; it appears at Appendix 1a to the petition. The decision of the United States Federal District Court for Arizona is not reported; it appears at Appendix 6a to the petition.

JURISDICTION

The Order sought to be reviewed was entered by the Ninth Circuit Court of Appeals on November 19, 2002. Appendix (App.) at 1a. The time allowed by law for filing a petition for writ of certiorari was extended by Justice O'Connor on February 13, 2003, from February 17, 2003 to and including March 19, 2003. No. 02-A663 petition is timely filed. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment, Fourteenth Amendment, 42 U.S.C. § 1983 and 42 U.S.C. § 1985.

STATEMENT OF THE CASE

A. Judicial Proceedings

This case began when the Chemehuevi Tribal Court had served on the non-Indian petitioners Complaints to evict them from their cabins on the California shoreline of Lake Havasu. The shoreline area is the designated flood and seep zone right of way retained by the Metropolitan Water District of Southern California and owned by the United States Bureau of Reclamation.

In order to protect their Fifth and Fourteenth Amendment individual rights to due process and equal protection of law and to protect their Fifth Amendment possessory interest rights to their cabins, the Petitioners filed suit in the United States District Court for Arizona to challenge whether the Chemehuevi Tribal Court has civil jurisdiction over their persons and property under *Montana v. United States*, 450 U.S. 544 (1981).

On May 18, 2001, BIA law enforcement officers from the Parker Arizona Agency, enforced the Chemehuevi tribal court eviction orders against the Petitioners Saucerman and Benjamin by removing them from their cabins on the shoreline of Lake Havasu. Petitioner Freeman of Needles Lodge was evicted through the self-help ordinance of the Chemehuevi tribe.

On July 9, 2001, the District Court dismissed the Complaint for lack of subject matter jurisdiction as required by the Ninth Circuit's interpretation of the Indian exception to the Quiet Title Act, 28 U.S.C. § 2409a, under *Metropolitan Water District of Southern California v. United States*, 830 F.2d 139(9th Cir. 1987) *aff'd sub.nom. California v. United States*, 490 U.S. 520 (1989). App. 6a. Because the Order dismissing the case failed to address the new Supreme Court cases of *Atkinson v. Shirley*, 532 U.S. 645 (2001) and *Nevada v.*

Hicks, 533 U.S. 353 (2001), petitioners filed a Motion for Reconsideration which was denied on February 7, 2002, during the briefing to the Ninth Circuit Court of Appeals. All of the issues raised in the Motion for Reconsideration were briefed in the Appeal.

The Ninth Circuit Court of Appeals affirmed the District Court's dismissal, relying solely on the Lindgren Solicitor's Opinion of August 15, 1974, as giving the Chemehuevi Indian tribe a "colorable claim" to title to the Lake Havasu shoreline. All other claims, including the civil rights claims to enforce the right of the petitioners to challenge tribal civil court jurisdiction over them were dismissed because of lack of subject matter jurisdiction under the Indian exception to the Quiet Title Act, 28 U.S.C. § 2409a(a). App. 1a.

B. Factual Background

The facts relating to this case began in 1907 when the Indian Service acted to create an Indian reservation for the Chemehuevi Indian Tribe in an area already reserved for the Reclamation Service. The dispute between the Reclamation Service and Indian Service was still unresolved in 1936 when the Parker Dam was being completed and the reservoir that is now Lake Havasu was filling with the waters of the Colorado River.

In 1936, Solicitor Margold wrote an Opinion clarifying the remaining Chemehuevi Tribal claims. Congress used the Margold Opinion to create a final resolution of the Chemehuevi claims in the Parker Dam Act of 1940, 54 Stat. 744. The Act extinguishes "all right, title and interest" of the Chemehuevi Indian Tribe to the lands needed for the reclamation project. All remaining tribal claims were extinguished in Indian Claims Commission Cases No. 351 and 351-A. Petitioners' cabins were built on the designated flood and seep right

of way of the reclamation project in the late 1940's under land use permits.

The Chemehuevi Indian Tribe is one of the five tribes for which the United States intervened in *Arizona v. California*, Orig. No. 8. In 1974, a new Solicitor's Opinion asserted that the Secretary of Interior has continuing discretionary authority from the Parker Dam Act to review the lands needed for reclamation purposes. The Lindgren Solicitor's Opinion was published in the Federal Register for August 15, 1974. 11 Op. Solic. 2071.

Within months of the publication of the Lindgren Opinion, a lawsuit entitled *Havasu Landing, Inc., et al. v. Rogers C.B. Morton*, No. CV 74-3565-EC, was filed by the non-Indian residents of the California shoreline. Attorneys for the Secretary of Interior claimed that a Secretarial Order was executed on August 15, 1974, which had restored "equitable title" of the California shoreline of Lake Havasu to the Chemehuevi Indian Tribe while also protecting the valid existing property rights of the non-Indians. The case was settled by agreement.

The cabin owners attempted to enforce the settlement agreement in *Havasu Landing Homeowners Assoc. et al. v. Babbitt*, 74 F.3d 1245 (9th Cir. 1996). The case was dismissed under the Indian Exception to the Quiet Title Act for lack of subject matter jurisdiction.

Then in 1992, the Department of Interior filed suit on behalf of the Chemehuevi Indian Tribe for trespass and ejectment against Havasu Landing mobile home residents who leased lots in *United States v. Jorgensen*, et al., 116 F.3d 1487 (9th Cir. 1997). Three different Secretarial Orders were alleged during the course of the litigation. The Department of Justice attorneys never produced any Secretarial Order. The Ninth Circuit decided that the California shoreline where the non-Indians reside is federal land.

Following the *Jorgensen* ruling, the Chemehuevi Tribe filed an application with the Bureau of Land Management (BLM) for a trust patent for the lands taken by the Parker Dam Act. This application is indefinitely pending. The BLM accepted permit renewal applications in February 2000 for the non-Indians on the shoreline that are also still pending. All of these facts are stated in the Complaint.

REASONS FOR GRANTING THE PETITION

This Court should resolve the conflict that exists between the Tenth and Ninth Circuit Courts of Appeal as to whether a "land status" element implicates the title of the land. This Court is the only court that can reverse the Ninth Circuit's *Metropolitan Water District* rationale substituting "colorable claim" for the plain language of the Indian exception to the Quiet Title Act, 28 U.S.C. § 2409a(a). *Metropolitan Water District of Southern California v. United States*, 830 F.2d 139 (9th Cir. 1987), *aff'd sub.nom. California v. United States*, 490 U.S. 520 (1989).

I. THE CONFLICT OVER LAND STATUS

The Tenth Circuit has ruled in *State of Kansas v. United States of America, et al.*, 249 F.3d 1213 (10th Cir. 2001) that an inquiry and findings as to "land status" for the Indian Gaming Regulatory Act (IGRA) does not divest a federal district court of subject matter jurisdiction under the Indian exception of the Quiet Title Act (QTA), 28 U.S.C. § 2409a(a). The Ninth Circuit misapplied the Indian exception to the Quiet Title Act in this case to divest subject matter jurisdiction to decide the land status element required by *Montana v. United States*, 450 U.S. 544 (1981).

The QTA reads:

> 'The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest.... This section does not apply to trust or restricted Indian lands....' 28 U.S.C. § 2409a(a).

The Tenth Circuit Court of Appeals is correct in *State of Kansas v. United States of America, et al.*, 249 F.3d 1213 (10th Cir. 2001) that the land status element of the Indian Gaming Regulatory Act (IGRA) does not conflict with the Indian Exception to the Quiet Title Act. Both IGRA and the *Montana* test require only that a Court decide whether the Indian tribe is asserting jurisdiction over Indian or non-Indian land. The simple determination of whether the status of the land is Indian or non-Indian violates the Indian exception of the QTA according to the Ninth Circuit. *Metropolitan Water District of Southern California v. United States*, 830 F.2d 139 (9th Cir. 1987), *aff'd sub.nom. California v. United States*, 490 U.S. 520 (1989).

Regardless of the land status determination, this lawsuit will not affect title to the tract. *State of Kansas* at 1225. The Tenth Circuit concluded that since the title was unaffected, the QTA, 28 U.S.C. § 2409a, did not limit judicial review of the agency decision under 5 U.S.C. § 702. *State of Kansas* at 1225. The Ninth Circuit dismissed this case pursuant to the Indian exception to the QTA without ever examining the land status. App. 3a-4a.

In *State of Kansas v. United States*, defendants claimed that because (1) the State's action is in effect one "to adjudicate a disputed title to real property in which the United States claims an interest," and (2) the tract constitutes "restricted Indian lands," the Government has not waived its sovereign immunity

from suit. *State of Kansas* at 1224. The Tenth Circuit confronted this circular reasoning by not allowing the United States to characterize the *Kansas* suit as arising under the QTA by *presupposing* that the land is *de jure* "Indian lands." *State of Kansas* at 1224.

The Tenth Circuit proceeded to determine whether the land in question was "trust or restricted Indian land" by examining the land status before determining whether the QTA applied. The Tenth Circuit concluded that the land was not Indian land and therefore, the QTA was not applicable.

The Ninth Circuit decision assumes defendant's position (1) that petitioners suit is really an attempt to litigate the title to the shoreline. App. 3a-4a. No claim is made in the Complaint challenging the title of the United States to the shoreline nor could it be without challenging the valid existing rights that are the basis of petitioners standing to sue. Additionally, petitioners brought suit in the Federal District Court for Arizona which has no subject matter jurisdiction to quiet title to any land in the state of California. *Wildman v. United States*, 827 F.2d 1306, 1307 (9th Cir.1987), citing *Sherrill v. McShan*, 356 F.2d 607 (9th Cir.1966).

The Ninth Circuit's application of *Metropolitan Water District* in this case presupposes (2) that the Lindgren Solicitor's Opinion makes the shoreline lands *de jure* "Indian lands" to divest all subject matter jurisdiction of the federal courts. App. 3a-4a. The decision intentionally ignores the specific factual allegations that the shoreline is owned in fee title by the Bureau of Reclamation (BOR) and that the Ninth Circuit itself in *United States v. Jorgensen*, et al., 116 F.3d 1487 (9th Cir. 1997), held that this shoreline is federal land.

The Ninth Circuit's circular reasoning can be broken by requiring the court to decide the land status of the shoreline before deciding whether the QTA applies as the Tenth Circuit did in *State of Kansas v.*

United States of America, et al., 249 F.3d 1213 (10th Cir. 2001). This includes adjudicating reservation boundaries which is conceptually distinct from adjudicating title to the same land. *State of Kansas* at 1225, citing *Navajo tribe of Indians v. New Mexico*, 809 F.2d 1455, 1475 (10th Cir. 1987). The Ninth Circuit and the trial court "fail to appreciate the discrete concepts of land status and land title." *State of Kansas* at 1225.

II. THE NINTH CIRCUIT ERRS BY SUBSTITUTING "COLORABLE CLAIM" FOR "TRUST OR RESTRICTED INDIAN LANDS"

The Ninth Circuit cites *Metropolitan Water District of Southern California v. United States*, 830 F.2d 139 (9th Cir. 1987), *aff'd sub.nom. California v. United States*, 490 U.S. 520 (1989), to divest the federal court of subject matter jurisdiction by holding that the Lindgren Solicitor's Opinion "met the burden" to hold that a colorable claim of Indian land exists under the Indian exception of the QTA. App. 3a-4a. The Ninth Circuit follows its own rationale rather than applying the interpretation of the Indian exception of the QTA made by this Court that the immunity is not waived where the land either is held in "trust or [is] restricted Indian lands." *Block v. North Dakota*, 461 U.S. 273, 275-6 (1983).

Metropolitan Water District follows and extends the rationale of *Wildman v. United States*, 827 F.2d 1306 (1987) interpreting the Indian exception to the QTA. *Wildman* was a preemptive action brought to quiet title to lands moved by avulsion from the California shoreline of the Colorado River to the Arizona shoreline adjoining the Fort Mojave Indian Reservation. The Ninth Circuit found that

> "Nothing in the statute or its history suggests that the United States was to be

> put to the burden of establishing its title when it has a colorable claim and has chosen to assert its immunity on behalf of land of which the government declares that it is the trustee for Indians....The immunity of the government applies whether the government is right or wrong." *Wildman* at 1309.

Using the colorable claim interpretation, the *Metropolitan Water District* opinion extended this QTA rationale even farther by preventing Section 702 of the Administrative Procedures Act from waiving the sovereign immunity of the United States. *Metropolitan Water District* at 143. The Ninth Circuit then prohibited tribal boundary determinations under the QTA by concluding that "The effect of a successful challenge would be to quiet title in others than the tribe." *Metropolitan Water District* at 143.

The resulting QTA rationale of the Ninth Circuit prevents non-Indians from being able to protect their property in a court under the Ninth Circuit. E. John Athens, Jr., *The Ninth Circuit Errs Again: The Quiet Title Act as a Bar to Judicial Review*, 19:2 Alaska Law Review 433 (2002). As the law review article states, "In other jurisdictions discussed below, courts have held that the Indian lands exception to the QTA does not bar judicial review of agency decisions that initially give rise to the claim that the property is Indian land. *The Ninth Circuit Errs Again* at 446. "There will be no judicial review based on constitutional claims, statutory claims, or factual claims, as long as the government can identify some rationale, even an incorrect one, for the agency decision. Without a bright line definition of 'colorable claim,' the federal government will be compelled by its trust duty to protect Native allotments to seek dismissal on the basis of the Indian lands exception to the QTA of

virtually any claim filed by Alaska, no matter how meritorious." *The Ninth Circuit Errs Again* at 458-9.

As this case demonstrates, using its QTA rationale the Ninth Circuit can make the QTA Indian exception apply even when there is a direct diminishment of the reservation by Congress, there are constitutional claims, the land is fee titled in the United States and only a Solicitor's Opinion of continuing discretionary authority exists to make a claim that the land is colorably Indian land. App. 3a-5a. The rationale of *Metropolitan Water District* and *Wildman* was approved by this Court in its *per curiam* order in *California v. United States*, 490 U.S. 520 (1989). Only this Court can correct the Ninth Circuit's misapplication of the Indian exception to the QTA.

III. JURISDICTION TO DETERMINE LAND STATUS DOES NOT REQUIRE A WAIVER OF THE SOVEREIGN IMMUNITY OF THE UNITED STATES

As previously stated, this case was brought to determine whether the Chemehuevi Tribal Court has civil jurisdiction to evict these non-Indians from their shoreline cabins on Lake Havasu under *Montana v. United States*. The petitioners alleged that the shoreline lands are not "trust or restricted Indian lands" because Congress specifically took "all right, title and interest" to the lands starting from the shoreline down into the river valley in the Parker Dam Act of 1940 for the Boulder Canyon Reclamation Project. 54 Stat. 744. Once taken for reclamation purposes, the Secretary of Interior is specifically prohibited by Congress from restoring lands within federal reclamation projects to Indian reservations or placing those lands into trust status for a tribe. 25 U.S.C. § 463 and § 575.

The jurisdiction of the federal courts to decide which sovereign has jurisdiction over a specific piece of

land once encompassed within Indian reservation boundaries has been upheld by this Court in numerous cases. See generally *Solem v. Bartlett*, 465 U.S. 463 (1984), *Atkinson v. Shirley*, 532 U.S. 645 (2001). None of these cases affected the title to the land.

Indian tribes and tribal members have often claimed tribal jurisdiction still exists over an area when they attempt to avoid state jurisdiction over criminal charges or to avoid state regulatory enforcement. *DeCoteau v. District County Court*, 420 U.S. 425 (1975), *Hagen v. Utah*, 510 U.S. 399 (1994), *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998).

Tribal members using tribal courts have also asserted jurisdiction over non-members and non-Indians for harm that occurred within reservation boundaries, requiring the federal courts to determine the extent of tribal court jurisdiction over particular tribal court claims. *Duro v. Reina*, 495 U.S. 676 (1990), *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), *El Paso Natural Gas v. Neztsosie*, 526 U.S. 473 (1999).

In all of the cases cited above, the federal courts had subject matter jurisdiction to make the land status determinations to provide a judicial resolution of the disputed claims without a waiver of the sovereign immunity of the United States.

In *South Dakota v. Bourland*, 508 U.S. 679 (1993), this Court expanded this jurisdiction to specifically include "the question of jurisdiction over non-Indians... the only question before us is whether the Tribe may regulate non-Indians who hunt and fish in the taken area." *Bourland* at 685, Fn 6.

The Parker Dam Act contains express diminishment language taking "all right, title and interest" of the Chemehuevi Indian Tribe to the project lands. *South Dakota v. Bourland* is on point for this case disputing tribal jurisdiction over non-Indians on the shoreline of Lake Havasu. This case has stronger facts

than *Bourland* because no tribal rights were reserved in the Parker Dam Act and no treaty ever existed between the Chemehuevi Tribe and the United States. Using the rationale of *Metropolitan Water District*, the Ninth Circuit divested itself of subject matter jurisdiction to decide this case. App. 3a-4a.

The Ninth Circuit's QTA rationale has the potential to nullify this Court's statement that "Hitherto, the absence of tribal ownership has been virtually conclusive of the absence of tribal civil jurisdiction; with one minor exception, we have never upheld under *Montana* the extension of tribal civil authority over nonmembers on non-Indian land." *Nevada v. Hicks*, 533 U.S. 353, 360 (2001). The Ninth Circuit's rationale may be applied to nullify any decision of this Court regarding tribal jurisdiction over non-Indians with which it does not agree including *Montana v. United States* and any opinions of this Court interpreting *Montana* if this decision is allowed to stand.

CONCLUSION

The petition for writ of certiorari should be granted.

DATED: March 19, 2003

Respectfully submitted,

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(Any footnotes trail the end of each document.)
No. 01-17009

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GORDON B. SAUCERMAN; JOE BENJAMIN; SHARRON BENJAMIN; CLEO FREEMAN,
Plaintiffs-Appellants,

v.

GALE NORTON, Secretary of the Interior; KEVIN GOVER, Assistant Secretary for Indian Affairs; ELUID MARTINEZ, Commissioner of Reclamation; WAYNE NORDWALL, Phoenix Area Director for Bureau of Indian Affairs; JANET WONG, Staff Solicitor; WAYNE SUMATZKUKU, Bureau of Indian Affairs Realty Specialist; WILLIAM TITCHYWY, ALLEN ANSPACH; CHEMEHUEVI TRIBAL COUNCIL; ROBERT MOELLER; EDWARD SMITH; DAVID CHAVEZ;; CHEMEHUEVI TRIBAL COUNCIL; DAVID CHAVEZ; EDWARD SMITH; ROBERT MOELLER,
Defendants-Appellees.

November 5, 2002 **, Submitted,
San Francisco, California

November 19, 2002, Filed

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JUDGES:
Before: McKEOWN and PAEZ, Circuit Judges, and POLLAK, *** Senior District Judge.

OPINION:

MEMORANDUM *

Before: McKEOWN and PAEZ, Circuit Judges, and POLLAK, *** Senior District Judge.

Appellants Gordon B. Saucerman, Joe Benjamin, Sharron Benjamin, and Cleo Freeman (collectively the "former permittees"), former occupants of cabins on the western shore of Lake Havasu in California (the "shoreline area"), filed this action against the Chemehuevi Tribal Council, Chemehuevi tribal officials,

and various federal government officials after tribal officials acted to enforce a self-help eviction ordinance. The complaint, alleging violations of the Administrative Procedures Act (APA), 5 U.S.C. § § 701-706, a taking of property in violation of the Fifth and Fourteenth Amendments, and constitutional violations under 42 U.S.C. § § 1983 and 1985, was dismissed for lack of subject matter jurisdiction. We affirm.

Congress established the Quiet Title Act of 1972 as the exclusive means to adjudicate a disputed title to real property in which the United States claims an interest. 28 U.S.C. § 2409a. The Act expressly reserves sovereign immunity in disputes involving property held in trust for Indian tribes. See id. at. § 2409a(a); United States v. Mottaz, 476 U.S. 834, 843, 90 L. Ed. 2d 841, 106 S. Ct. 2224 (1986).

The former permittees contend that the Quiet Title Act is not applicable because this is not a title dispute. Their argument is precluded by our decision in Metropolitan Water District of Southern California v. United States, 830 F.2d 139, 143 (9th Cir. 1987), aff'd, 490 U.S. 920, 104 L. Ed. 2d 981, 109 S. Ct. 2273 (1989) (holding that the Quiet Title Act displaces APA review of administrative decisions affecting title to land in which the United States claims an interest based on the land's status as trust or restricted Indian land). Because "the effect of a successful challenge would be to quiet title in others than the tribe," the former permittees may not avoid the Indian lands exception to the Quiet Title Act. Id.

Preservation of immunity under the Indian lands exception to the Act applies as long as the government has a "colorable claim" regarding its title as trustee to the land at issue. Wildman v. United States, 827 F.2d 1306, 1309 (9th Cir. 1987). This burden has been met. See, e.g., Authority of Secretary to Determine Equitable

Title to Indian Lands, 11 Op. Solic. 2071, 2071 (Aug. 15, 1974) (recognizing that the "Chemehuevi Reservation was established in 1907" and concluding that Secretary of the Interior has authority to grant equitable title of disputed lands to Chemehuevi tribe); Act of July 8, 1940, 54 Stat. 744 (authorizing Secretary of Interior to designate Chemehuevi Reservation lands for construction of Parker Dam); see also Chemehuevi Indian Tribe v. California State Bd. of Equalization, 757 F.2d 1047, 1050 (9th Cir.), rev'd on other grounds, 474 U.S. 9, 88 L. Ed. 2d 9, 106 S. Ct. 289 (1985) ("Since time immemorial, the Chemehuevi Indian Tribe has resided in the Chemehuevi Valley ... in the area that is now part of the Chemehuevi Indian Reservation."). Therefore, the district court properly dismissed the former permittees' APA claims.

Although referenced in passing, the former permittees did not offer in their opening brief any arguments specifically directed toward the takings claim and thus we decline to address it. See Greenwood v. FAA, 28 F.3d 971, 977 (9th Cir. 1994) ("We review only issues which are argued specifically and distinctly in a party's opening brief. We will not manufacture arguments for an appellant, and a bare assertion does not preserve a claim, particularly when, as here, a host of other issues are presented for review.") (citations omitted).

The remaining claims allege violations of 42 U.S.C. § § 1983 and 1985 by both tribal and federal officials. Indian tribes are generally immune from suit in federal court unless they or Congress have waived their immunity. See United States v. Oregon, 657 F.2d 1009, 1012-13 (9th Cir. 1981). No such waiver is present in this case, and this immunity extends to tribal officials acting in their official capacity within their scope of authority, as alleged in the complaint here. See Imperial Granite

Co. v. Pala Tribe of Mission Indians, 940 F.2d 1269, 1271 (9th Cir. 1991); Oregon, 657 F.2d at 1012 n.8. The remaining claims against the tribal officials were therefore appropriately dismissed.

It was also proper to dismiss the remaining claims against the federal officials. It is well established that the United States is immune from suit absent its express consent. See United States v. Mitchell, 445 U.S. 535, 538, 63 L. Ed. 2d 607, 100 S. Ct. 1349 (1983) ("A waiver of sovereign immunity cannot be implied but must be unequivocally expressed.") (internal quotations and citation omitted). This immunity cannot be avoided by simply naming federal officers and employees as defendants. Gilbert v. DaGrossa, 756 F.2d 1455, 1458 (9th Cir. 1985). By their terms, § § 1983 and 1985 contain no explicit waiver of sovereign immunity by the federal government. See 42 U.S.C. § § 1983 and 1985.

AFFIRMED.

Footnotes

** This panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

*** The Honorable Louis H. Pollak, Senior United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

*** The Honorable Louis H. Pollak, Senior United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

No. C V01-182-PHX-SRB

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

GORDON B. SAUCERMAN et al.,
Plaintiffs

v.

Bruce Babbitt, et al.,
Defendants.

ORDER

Pending before the Court are Defendants' Motion to Dismiss for lack of subject matter jurisdiction and/or failure to join an indispensable party (doc. 22), and Defendants' Motion to Dismiss for improper venue (doc. 28). The Court now rules on the motions.

I. BACKGROUND

Plaintiffs are individuals who claim leasehold interests on federally owned land on the western shoreline of Lake Havasu in California. Plaintiffs filed suit against various defendants, including federal officials, the Chemehuevi Tribal Council, and Chemehuevi Tribal officials. The Chemehuevi Tribe maintains that title to the land occupied by Plaintiffs is held by the United States in trust for the Tribe and has sought to enforce a self-help eviction ordinance against Plaintiffs. Plaintiffs seek a determination from the Court as to whether the Chemehuevi Tribe has jurisdiction over Plaintiffs and their property.

The relevant facts and procedural history are as follows.

In July, 1940, Congress authorized the Secretary of the Interior to designate certain lands within the Chemehuevi Reservation to be taken in aid of the construction of the Parker Dam Project. On November 25, 1941, the Secretary of the Interior approved a description of lands to be withdrawn which included lands within the Reservation below the 465-foot contour line. Following the completion of Parker Dam and creation of Lake Havasu, the water level did not rise up to the projected 465-foot contour line. The lake level rose to the 450-foot contour line, resulting in a strip of shoreline above the lake level owned by the United States, the land at issue in this action.

This strip of shoreline was administered by the Bureau of Land Management and the United States Fish and Wildlife Service up until 1974. During this time period, the United States issued permits to non-Indians to build cabins on this land. Plaintiffs are non-Indians who had use permits granted by the United States Fish and Wildlife Service before 1974 and occupy cabins on this shoreline area.

On November 1, 1974, the Secretary of the Interior issued an order restoring equitable title to the Chemehuevi Tribe to certain lands within the Reservation previously acquired by the United States in 1941. Included in these lands was the shoreline area in dispute – the shoreline between thy 450-foot and 465-foot contour lines.

On November 17, 2000, the Chemehuevi Tribe filed a complaint against Plaintiffs in Chemehuevi Tribal Court, alleging that Plaintiffs refused to vacate tribal land after their permits had expired and that they continued to occupy the land without the consent of the Tribe or the Secretary of the Interior in violation of tribal and federal

law. Plaintiffs failed to appear and defend and default judgments have been entered against them.

On January 31, 2001, Plaintiffs filed a Complaint for declaratory and injunctive relief and for violation of their civil rights. Plaintiffs' first through third causes of action allege violations of the Administrative Procedures Act ("APA"), 5 U.S.C. §§ 701-706. Plaintiffs generally allege that legal title to the lands in question is not held in trust for the Tribe by the United States. Plaintiffs allege that these lands were expressly and permanently diminished by the Parker Dam Act of 1940. Plaintiffs further allege that the Secretary of the Interior was without the authority to place the lands in trust for the Chemehuevi Tribe, and therefore, the Chemehuevi Tribal Council and Tribal court cannot exercise valid jurisdiction over Plaintiffs or their property.

Plaintiffs' fourth claim for relief alleges the taking of property under the Fifth and Fourteenth Amendments to the United States Constitution. Plaintiffs' fifth and sixth claims for relief allege violations of 42 U.S.C. § 1985. In their prayer for relief Plaintiffs request the Court to order the production of the entire administrative record; to enjoin the tribal council from seizing cabins through enforcement of the Tribe's self-help ordinance; to enjoin the tribal council from proceeding in tribal court to evict Plaintiffs; and to declare the Parker Dam Act of 1940 and payment of compensation to members of the Tribe as constituting a permanent diminishment of the Chemehuevi Reservation.

On February 14, 2001, Plaintiffs filed an Application For Temporary Restraining Order. In their application, Plaintiffs requested a temporary restraining order to prevent "any further action by any Defendant to claim that the Secretary of the Interior (SOI) restored

equitable title to the Chemehuevi Indian Tribe (Tribe) to the lands occupied by Plaintiffs until Defendants produce for the inspection of this Court and Plaintiffs the entire administrative record regarding the proposed Secretarial Orders of 1974 and certified Title Status Report of the lands which are the subject of this suit." The Court heard oral argument on Plaintiffs' Application for Temporary Restraining Order on February 22,2001. Plaintiff's Application was denied. At the conclusion of the hearing, the parties entered into a stipulation which provided that:

neither the Tribe, nor the Tribal Council will take any action to execute on a . . . Writ of Assistance or any order of this Court (the Tribal Court) without giving counsel for the plaintiff notice that the order has been entered at least 24 hours before any execution takes place in order to allow sufficient time for application, if appropriate, for a Temporary Restraining Order to prevent any dispossession of the plaintiffs.

On May 8, 2001, the Clerk of the Chemehuevi Tribal Court issued a Writ of Assistance to enforce the terms of the default judgments entered against Plaintiffs. On May 11, 2001. Plaintiffs filed a second Application for Temporary Restraining Order requesting the Court enjoin the Chemehuevi Tribal Court from executing its Writ of Assistance. The Court heard oral argument on Plaintiffs' Application for Temporary Restraining Order on May 15, 2001. Finding that Plaintiffs failed to exhaust tribal court remedies, the Court denied Plaintiff's Application for Temporary Restraining Order.

II. DISCUSSION

The Tribal and federal Defendants move to dismiss for lack of subject matter jurisdiction and for failure to join

a party under Rule 19 of the Federal Rules of Civil Procedure. Defendants assert the following arguments: (1) Plaintiffs' suit against the Tribal Defendants is barred by the Tribe's sovereign immunity; (2) the Tribe is an indispensable party; (3) Plaintiffs have failed to exhaust tribal administrative and tribal court remedies; (4) suit against the federal Defendants is barred by the United States' sovereign immunity under the Quiet Title Act; and (5) Plaintiff's claims are barred by res judicata. The federal Defendants also move to dismiss for improper venue.

When considering a motion to dismiss pursuant to Rule 12(b)(1), a district court is not restricted to the face of the pleadings, but may review evidence such as affidavits and testimony, to resolve factual disputes concerning the existence of jurisdiction. Federal Deposit Insurance 885 F.2d 633 635-36 (9th Cr. 1989).

Plaintiffs assert that the Court has subject matter jurisdiction to determine whether the Chemehuevi Tribal Court exceeded its jurisdiction by exercising judicial power over Plaintiffs, who are non-Indian parties. In Strate v. A-1 Contractors, 520 U.S. 438 (1997), the Supreme Court held that a tribal court lacked jurisdiction over litigation between nonmembers arising out of a vehicle accident on a state highway within the reservation. Holding that a right-of-way was the equivalent of non-Indian owned fee land, the Court held that the tribe therefore lacked jurisdiction under Montana v. United States, 450 U.S. 544 (1981). In Montana v. United States, the Supreme Court resolved the issue of whether a tribe lacked the power to regulate hunting and fishing by non-Indians on non-Indian owned fee land within the reservation. In holding that the tribe was without such regulatory authority, the court in Montana set forth the general rule that Indian tribes lack

civil authority over the conduct of nonmembers on non-Indian land within a reservation, subject to two exceptions: (1) nonmembers with consensual relationships with the tribe or its members; or (2) conduct that threatened or directly affected the tribe's political integrity, economic security, health or welfare.

The Court recognizes that federal courts generally have the authority to determine whether a tribal court has exceeded the limits of its jurisdiction. See National Farmers Union Ins. Cos. v. Crow Tribe, 471, U.S. 845, 852 (1985). However, the United States Supreme Court has mandated the exhaustion of tribal court remedies as a prerequisite to a federal court's exercise of jurisdiction.fn1 See Id. at 854-57; Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 16 (1987). In National Farmers Union, the Supreme Court recognized that "Congress is committed to a policy of supporting tribal self-government and self-determination." 471 U.S. at 856. "That policy," the Supreme Court stated, "favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal basis for the challenge." Id. A federal court is directed to "stay its hand" until the tribal court has had a "full opportunity to determine its own jurisdiction" and to correct any errors it may have made. Id. at 857; Iowa Mutual, 480 US. at 16.

In November, 2000, the Chemehuevi Tribe filed a complaint against Plaintiffs in Chemehuevi Tribal Court alleging that they occupied tribal land in violation of tribal and federal Law. Plaintiffs failed to appear and defend in that action and default judgments were entered against them. In January, 2001, Plaintiffs filed suit in federal court requesting a determination whether the Tribal Court could exercise valid jurisdiction over Plaintiffs and their property. As the Court held in its

Order denying Plaintiffs' Application for a Temporary Restraining Order, Plaintiffs have failed to exhaust tribal court remedies before proceeding to federal court. Nonetheless, even if Plaintiffs were allowed to proceed in federal court after exhausting tribal court remedies, the Court finds that Plaintiffs claims are barred by the Quiet Title Act.

The Defendants claim that the Court lacks subject matter jurisdiction because the government is immune from suit under the Quiet Title Act, 28 U.S.C. § 2409a. "The QTA permits the United States to be named as a defendant in lawsuits seeking the adjudication of disputed title to land. However, when the United States claims an interest in real property based upon that property's status as trust or restricted Indian lands, the Government is immune from suit under the QTA." Metropolitan Water Dist. of Southern Cal. v. United States, 830 F.2d 139, 143 (9th Cir. 1987) aff'd sub nom. California v. United States, 490 U.S. 920 (1989).

Plaintiffs argue that the QTA does not govern this action because they seek only a determination by the Court whether the Tribal Court has jurisdiction over Plaintiffs and their property, which would not affect title to the lands in question. Plaintiffs claim that a decision whether the Parker Dam Act of 1940 constituted a diminishment of the lands in question would only determine the status of the land and would not affect any claim of title to the land.

In Metropolitan, the court considered whether the QTA exception to Indian lands applied to reservation boundary disputes between a tribe and a water district. 830 F.2d at 141. While recognizing that the water district was "not seeking to quiet title in itself," the court held that the QTA applied because the water district sought

"a determination of the boundaries of the Reservation" and "[t]he effect of a successful challenge would be to quiet title in others than the Tribe." Id. at 143. The Ninth Circuit later commented that "Metropolitan Water District expanded the application of the QTA to govern suits involving plaintiffs who, while not seeking to quiet title in themselves, might potentially affect the property rights of others through successfully litigating their claims." Alaska v. Babbitt, 38 F.3d 1068, 1074 (9th Cir.1994).

While Plaintiffs do not challenge legal title to the lands at issue, they do seek a declaration that the land is not held in trust by the United States for the benefit of the Tribe. The Court finds that this attempt to divest the Tribe of their equitable title to the land is sufficient to invoke the application of the QTA. The effect of a successful claim by Plaintiffs would vest equitable title "in others than the Tribe." Metropolitan, 830 F.2d at 143.

The QTA's preservation of immunity for the government applies without regard to the ultimate validity of the government's assertions of title. The Ninth Circuit has stated that "[t]he immunity of the government applies whether the government is right or wrong." Wildman v. United States, 827 F.2d 1306, 1309 (9th Cir. 1987). "The very purpose of the doctrine is to prevent a judicial examination of the merits of the government's position." Id. Further, "[n]othing in the [QTA] or its history suggests that the United States was to be put to the burden of establishing its title when it has a colorable claim and has chosen to assert its immunity on behalf of land of which the government declares that it is the trustee for Indians," Id.

In this case, the government has a "colorable claim" regarding its title as trustee to the land at issue. The

November 1, 1974 Order of the Secretary of the Interior on its face restored equitable title to the Chemehuevi Tribe to all the lands within the Reservation previously taken by the United States in 1941. A Department of Interior opinion from 1974 recognized the existence of the Chemehuevi Reservation and found that the Secretary of Interior has the authority to determine, establish and confirm that the Chemehuevi Tribe has equitable title to the lands in question. See Authority of Secretary to Determine Equitable Title to Indian Lands, 11 Op. Solic. 2071, 2072 (Aug. 15, 1974) (exhib. 7 of Plaintiffs' Notice of Application for Temporary Restraining Order).

Plaintiffs have filed suit under the Administrative Procedures Act, 5 U.S.C. §§ 701-706, alleging that federal Defendants acted in excess of their authority by placing the lands in question in trust for the Chemehuevi Tribe. Any claim by Plaintiffs that an "officer's suit" brought under the APA provides an independent means to waive the government's sovereign immunity for claims against the government otherwise precluded by the QTA, is without merit.

The Supreme Court has expressly held that "Congress intended the QTA to provide the exclusive means by which adverse claimants could challenge the United States' title to real property" Block v. North Dakota, 461 U.S. 284, 286 (1983). The Supreme Court stated that if plaintiffs are permitted to avoid the provisions of the QTA by bringing an officer's suit, then, "the Indian lands exception to the QTA would be rendered nugatory." Id. at 284-85.

The Ninth Circuit has also held that a claimant may not circumvent the Indian lands exception to the QTA by obtaining jurisdiction under the APA. State of Alaska v.

Babbitt, 75 F.3d 449, 453 (9th Cir. 1996) (holding officer's suit against the Bureau of Land Management was precluded by the United States' sovereign immunity under Indian lands Exception to the QTA); McIntyre United States 798 F.2d 1408 14 10 11 (9th Cir. 1986) (rejecting action brought under 702 of APA and holding that the QTA is the exclusive means to challenge government's title to real property), rev 'd on other grounds, Fadem v. United Stares, 52 F.3d 202 (9th Cir. 1995); State of Alaska v. Babbitt, 182 F .3 d 672, 674 (9th Cir. 1999) ("a plaintiff cannot avoid the Indian lands exception by obtaining jurisdiction under the Administrative Procedure Act").

For the above reasons, the Court concludes that the Indian lands exception to the QTA preserves immunity of the United States and therefore the federal defendants are immune from suit.

The United States is an indispensable party to any suit brought to establish an interest in Indian trust land. Imperial Granite Co. v. Pala Band of Mission Indians, 940 F.2d 1269, 1272 n.4 (9th Cir. 1991) (citing Minnesota v. United States, 305 U.S. 382, 326 (1939)) In addition, "the United States is a necessary party to any action in which the relief sought might interfere with its obligation to protect Indian lands against alienation." Carlson v. Tulalip Tribes of Washington, 510 F.2d 1337, 1339 (9th Cir. 1975). The inability to join the United States as an indispensable party in this case due to immunity from suit, must result in dismissal. Imperial Granite, 940 F.2d at 1272 n. 4. Consequently, Plaintiff's claims against the remaining Tribal Defendants are dismissed.fn2

IT IS ORDERED granting Defendants' Motion to Dismiss for lack of subject matter jurisdiction (doc. 22).

IT IS FURTHER ORDERED dismissing as moot Defendants' Motion to Dismiss for Improper Venue (doc. 28).

DATED this 6th day of July, 2001.

Susan R. Bolton
United States District Judge

Footnotes

fn1 The exhaustion requirement is subject to three exceptions under which litigants may proceed directly to federal court: (1) where assertion of tribal jurisdiction is motivated by harassment or bad faith or (2) where the action is patently violative of express jurisdictional prohibitions; or (3) where exhaustion would be futile due to an inadequate opportunity to challenge the tribal court jurisdiction. National Farmers Union, 471 U.S. at 856 n. 21; see also Strate, 520 U. S. at 459 n. 14.

fn2 The Court also notes that Plaintiffs' Complaint raises serious res judicata problems. In this action Plaintiffs attempt to relitigate the same issues that were raised and decided in Havasu Landing Homeowners Assoc. v. Babbitt No. CV-92-061 84 (C. D. Cal. Feb. 1, 1994) and affirmed by the Ninth Circuit Court of Appeals in Havasu Landing Homeowners Assoc. v. Babbitt, No. CV 92-06184 (9th Cir. Jan. 22, 1996). There, as here, the plaintiffs argued that the lands in question were not part of the Chemehuevi Indian Reservation. The district court in that case dismissed the suit for lack of subject matter jurisdiction on wounds of federal sovereign immunity. While the parties in both cases are not identical, Plaintiff Gordon B. Saucerman was a named plaintiff in the prior litigation. Cleo M. Freeman claims

an interest on behalf of Needles Lodge in this case. Needles Lodge was a named plaintiff in the prior litigation.

Furthermore, Plaintiffs Gordon B. Saucerman and Joe Benjamin entered into a settlement agreement with the Chemehuevi Tribe and the Secretary of the Interior in 1976. Under the terms of the settlement agreement, the parties agreed to dismiss with prejudice the pending lawsuit, Havasu Landing Inc. v. Morton, No. CV-74-3665 (C.D. Cal) filed by plaintiffs, including the Havasu Landing, Inc. and Havasu Homeowners Association, against the Secretary of Interior and the Chemehuevi Tribe. The lawsuit challenged the authority of the Secretary of Interior to restore the equitable ownership of the shoreline to the Chemehuevi Tribe. Under the terms of the settlement agreement, Saucerman, Benjamin and Needles Lodge signed releases, agreeing to release the Tribe and the United States from all claims arising out of or related to the subject matter of the law suit.

Supreme Court, U.S.
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No. 02-1393

In The Supreme Court of the United States

GORDON B. SAUCERMAN; JOE BENJAMIN; SHARRON BENJAMIN; CLEO FREEMAN,

Petitioners,

v.

GALE NORTON, Secretary of the Interior; KEVIN GOVER, Assistant Secretary for Indian Affairs; ELUID MARTINEZ, Commissioner of Reclamation; WAYNE NORDWALL, Phoenix Area Director for Bureau of Indian Affairs; JANET WONG, Staff Solicitor; WAYNE SUMATZKUKU, Bureau of Indian Affairs Realty Specialist; WILLIAM TITCHYWY, ALLEN ANSPACH; CHEMEHUEVI TRIBAL COUNCIL; ROBERT MOELLER; EDWARD SMITH; DAVID CHAVEZ,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Does the Indian Lands Exception to the Quiet Title Act divest the Federal District Court of jurisdiction over claims relating to real property where:

1. The United States has presented a colorable claim of an interest in the real property based on that property's status as Indian trust land in the form of a Secretarial Order issued pursuant to a Congressional delegation of authority; and

2. In order to assert jurisdiction over the claims, the District Court would be required to determine whether or not the real property is held in trust by the United States for the benefit of an Indian Tribe?

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KAPPLER, CHARLES J., INDIAN AFFAIRS LAWS AND TREATIES, Vol. VI 2

BRIEF IN OPPOSITION

Respondents, Chemehuevi Tribal Council, Robert Moeller, Edward Smith, David Chavez ("Tribal Respondents"), respectfully oppose and urge this Court to summarily deny the petition for writ of certiorari filed by Petitioners Gordon Saucerman, Joe Benjamin, Sharron Benjamin, and Cleo Freeman ("Petitioners"). The Petition questions whether the Quiet Title Act, 28 U.S.C. §2409a, divested the District Court below of subject matter jurisdiction over Petitioners' claim that the United States does not hold title to a portion of the Chemehuevi Reservation in trust for the Chemehuevi Indian Tribe ("Tribe") and that, therefore, the Chemehuevi Tribal Court lacked jurisdiction to hear an unlawful detainer action brought by the Tribe to evict the Petitioners. This issue has been resolved by the decision of the Ninth Circuit Court of Appeals in *Metropolitan Water District of Southern California v. United States*, 830 F.2d 139 (9th Cir. 1987), *aff'd sub nom California v. United States*, 490 U.S. 920, 109 S.Ct. 2273, 104 L.Ed.2d 981 (1989), as well as other Ninth Circuit precedent, and Petitioners' arguments that there is a conflict between the Ninth and Tenth Circuits on the issue of the effect of the Quiet Title Act are meritless.

CORRECTIONS AND ADDITIONS TO PETITIONERS' STATEMENT OF THE CASE

Petitioners' statement of facts as set forth in their Petition is incomplete and inaccurate. The Tribal Respondents, therefore, submit the following statement of the facts relevant to the consideration of the Petition:

The Chemehuevi Indian Reservation ("Reservation") was created by order of the Secretary of the Interior ("Secretary") on February 2, 1907, pursuant to the provisions of the Mission Indian Relief Act, 26 Stat. 712 (January 12, 1891), and the Congressional Appropriations Act of March 1, 1907, 34 Stat. 1015.

On July 8, 1940, Congress passed an "Act for the Acquisition of Indian Land for the Parker Dam and Reservoir Project . . . " 54 Stat. 744 ("Parker Dam Act"). The Act granted to the United States "all the right, title, and interest" to the "tribal . . . lands of the . . . Chemehuevi Reservation . . . *as may be designated by the Secretary of the Interior.*" (Emphasis added.) KAPPLER, CHARLES J., INDIAN AFFAIRS LAWS AND TREATIES ("KAPPLER"), Vol. VI, pp. 88-89 (54 Stat. 744).

Pursuant to this authority, Secretary Harold Ickes designated all the land within the Reservation from the Colorado River on the east to the 465th elevation line on the west, comprising 7,776.12 acres. See Solicitor's Opinion of August 15, 1974, *Authority of the Secretary to Determine Equitable Title to Indian Lands*, 11 Op. Sol. 2071, 2072.

After the United States acquired the designated land, the United States completed construction of the Parker Dam. The level of Lake Havasu, however, only rose to the 450th elevation line, leaving a strip of land owned by the United States within the Reservation, lying between the 450th and 465th elevation lines. *Id.*

This strip of shoreline land ("Shoreline") was administered first by the United States Fish and Wildlife Service and then by the Bureau of Land Management until August 14, 1974. During that time, those federal agencies issued

site-use permits to non-Indians, including the Petitioners, to build residences and operate the Needles Lodge on the Shoreline. Petition, p.7a. The net result was that the Tribe lost not only its valuable bottom lands as a result of the inundation of Lake Havasu, but also the lands riparian to the lake, which had considerable recreational and development value. 11 Op. Sol. 2072. The Solicitor noted in the 1974 Opinion that:

> As a consequence, the purpose for which the Chemehuevi Reservation was created – to provide a lasting homeland for the Chemehuevi Indians – has been frustrated to a great degree. Most of the Reservation remaining in Indian control after the construction of Parker Dam is desert and mesa land unsuitable for habitation; in fact, I am advised that only one Chemehuevi family has resided there in recent years. The only land of substantial value in the area is the shoreline property.

Id.

The Solicitor accordingly determined that it was appropriate to modify Secretary Ickes's original designation "by correcting the 1941 description of lands taken, deleting from it the lands not permanently flooded. . . . " *Id.* at 2073. The Solicitor noted that this step "would merely confirm equitable title in the Chemehuevies to the lands in question." *Id.*

A final Secretarial Order ("Restoration Order") correcting the 1941 designation was signed by Secretary Rogers Morton on November 1, 1974. The Restoration Order restored the Shoreline to the Tribe's equitable ownership above the elevation of 450 feet on m.s.l. Petition, p.7a.

In late 1974, the Petitioners[1] and other shoreline permit-holders filed suit challenging the validity of the Restoration Order. *Havasu Landing, Inc., et al. v. Morton, et al.*, United States District Court for the Central District of California, No. CV 74-3665 EC (1974). Rather than litigate the case, the parties entered into a Settlement Agreement resulting in a dismissal of the case. Under the Settlement Agreement, the Tribe entered into long-term leases with the Petitioners that expired on July 1, 1990, in exchange for which each of the Petitioners executed releases agreeing forever to never challenge the legality of the Restoration Order.

After Petitioners' leases expired, they refused to enter into new leases with the Tribe and held over in possession of the premises within the Shoreline. Petition, p.7a.

On November 17, 2000, the Tribe filed suit against Petitioners G.B. Saucerman ("Saucerman") and Joseph and Sharon Benjamin ("Benjamin") in the Chemehuevi Tribal Court ("Tribal Court") for trespass, ejectment and damages. Petition, p.7a. Saucerman and Benjamin were served with a summons and a complaint. The summons advised each of them that they had 30 calendar days after service of the summons to file a type-written response with the Tribal Court. The summons advised Saucerman

[1] Robert White, on behalf of the Needles Rod, Gun and Boat Club, executed the Settlement and the release discussed below. Petitioner Cleo Freeman is identified in the complaint filed with the District Court as "a non-Indian resident of Arizona and is a member of Needles Lodge, which has a possessory interest in a building on the western shoreline of Lake Havasu." His standing is that of a representative of the Needles Lodge, which is another name for the Needles Rod, Gun, and Boat Club.

and Benjamin that the type-written response must be in a proper legal form and that the form could be obtained from the Clerk of the Tribal Court. The instructions for the form informed Saucerman and Benjamin that they were entitled to be represented by an attorney in Tribal Court.

Neither Saucerman nor Benjamin filed an answer or other responsive pleading to the complaint with the Tribal Court within the 30 days, as was required under the Tribal Court's Rules of Procedure. Petition, pp.7a-8a.

Instead, Petitioners Saucerman and Benjamin, along with Petitioner Cleo Freeman, on behalf of the Needles Lodge, filed suit against the Tribal Respondents and certain federal officials in the District Court below, seeking to enjoin the Tribal Court proceedings on the grounds that the Tribal Court lacked jurisdiction over Saucerman and Benjamin. Petitioners argued that the Tribal Court lacked jurisdiction because the land they occupied, a portion of the Shoreline, was not tribal land. Petition, p.8a. The Tribal Respondents and the United States moved to dismiss the action on the grounds, among other things, that the Tribe, its officials, and the federal officials were immune from suit. Petition, pp.9a-10a.

On July 9, 2001, the District Court granted the Tribal Respondents' and the United States' motion and dismissed the complaint. Petition, pp.6a-17a. On appeal, that decision was upheld by the Court of Appeals for the Ninth Circuit. Petition, pp.1a-5a.

REASONS FOR DENYING THE WRIT

I.

THE ISSUES RAISED IN PETITION DO NOT FALL WITHIN THE COURT'S GUIDELINES FOR GRANTING A PETITION

Under Rule 10 of the United States Supreme Court's Rules of Court ("Rule 10"): "A petition for writ of certiorari will be granted only for compelling reasons." The legal issues raised by Petitioners do not qualify under any of the criteria listed in Rule 10(a)-(c).

Of the criteria identified in Rule 10, only subdivision (a) has any possible application to this petition. Rule 10(a) states, in relevant part, that this Court considers, as a reason for granting a petition for writ of certiorari, cases in which "a United States Court of Appeals has entered a decision in conflict with the decision of another United States Court of Appeals on the same important matter." Petitioners have portrayed the present case as one that involves a conflict between the United States Court of Appeals for the Ninth Circuit and the United States Court of Appeals for the Tenth Circuit relating to the effect of the Quiet Title Act, arguing that the Ninth Circuit's decision in *Metropolitan Water District of Southern California v. United States*, *supra*, ("*Metropolitan*") is in conflict with *State of Kansas v. United States, et al.*, 249 F.3d 1212 (10th Cir. 2001) ("*Kansas*"). This Opposition Brief will demonstrate that no such conflict exists between the Ninth and Tenth Circuits and that Petitioners' other claims are meritless.

II.

THE INDIAN LANDS EXCEPTION TO THE QUIET TITLE ACT BARS PETITIONERS' CLAIMS

The Petitioners have no right of possession or claim of title to the land in question in this case. They are trespassers who held over in possession of the land after their leases with the Tribe expired. Their only basis for challenging the Tribal Court's jurisdiction is the assertion that the Shoreline is not Reservation land (i.e., not owned by the United States in trust for the Tribe), because the Secretary had no authority to issue the Restoration Order. The District Court rejected Petitioners' argument and ruled that it lacked subject matter jurisdiction over Petitioners' claims because the United States was and is a necessary and indispensable party to the proceedings that could not be joined because it is immune from suit under the Quiet Title Act ("QTA"), citing among other authorities, *Metropolitan*, *supra*.

> The QTA permits the United States to be named as a defendant in lawsuits seeking the adjudication of disputed title to land. However, when the United States claims an interest in real property based upon that property's status as trust or restricted Indian lands, the Government is immune from suit under the QTA.

Metropolitan, 830 F.2d at 143.

Petitioners argue that the QTA does not govern this action because they seek only a determination by the Court as to whether the Tribal Court has jurisdiction over Petitioners and their property, which would not affect title to the lands in question. Petitioners further claim that a decision as to whether the Secretary had the authority to

issue the Restoration Order would only determine the status of the land and would not affect any claim of title to the land.

In *Metropolitan,* the court considered whether the QTA's Indian lands exception applied to reservation boundary disputes between a tribe and a water district. *Id.,* at 830 F.2d at 141. While recognizing that the water district was "not seeking to quiet title in itself," the court held that the QTA applied because the water district sought "a determination of the boundaries of the Reservation" and "[t]he effect of a successful challenge would be to quiet title in others than the Tribe." *Id.* at 143. The Ninth Circuit later commented that "*Metropolitan Water District* expanded the application of the QTA to govern suits involving plaintiffs who, while not seeking to quiet title in themselves, might potentially affect the property rights of others through successfully litigating their claims." *Alaska v. Babbitt,* 38 F.3d 1068, 1074 (9th Cir. 1994).

While Petitioners do not challenge the United States' ownership of the Shoreline, they do seek a declaration that the land is *not* held in trust by the United States for the benefit of the Tribe. A successful claim by Petitioners would affect the United States title to the Shoreline by vesting equitable title "in others than the tribe." *Metropolitan,* 830 F.2d at 143. This attempt to divest the tribe of its equitable title to the land is sufficient to invoke the application of the QTA.

The Ninth Circuit has further stated that "the immunity of the government applies whether the government is right or wrong." *Wildman v. United States,* 827 F.2d 1306, 1309 (9th Cir. 1987). "The very purpose of the doctrine is to prevent a judicial examination of the merits of the

government's position." *Id.* Further, "[n]othing in the [QTA] or its history suggests that the United States was to be put to the burden of establishing its title when it has a colorable claim and has chosen to assert its immunity on behalf of land of which the government declares that it is the trustee for Indians." *Id.*

In this case, the government has a "colorable claim" regarding its title as trustee to the Shoreline. By enacting the Parker Dam Act, Congress expressly recognized the existence of the Chemehuevi Reservation. The Restoration Order, on its face, restored equitable title to the Tribe to all the Shoreline within the Reservation previously taken by the United States in 1941. The 1974 Solicitor's Opinion expressly found that the Secretary had the authority to correct his 1941 designation and to return equitable ownership of the Shoreline to the Tribe, because those lands were not needed for the construction of the Parker Dam and the creation of Lake Havasu. 11 Op. Sol. 2071, 2072.

Petitioners attempt to counter the foregoing analysis by characterizing the *Kansas* decision as conflicting with that of *Metropolitan*. Petitioners argue that both cases involve the issue of the status of the land, not title to the land and, therefore, because the 10th Circuit concluded that the QTA did not apply to the claims against the tribe in *Kansas*, that decision is in conflict with *Metropolitan*. In fact, the two cases are easily distinguishable.[2]

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[2] While the Tribal Respondents will address the issue of the alleged conflict between *Metropolitan* and *Kansas*, they will do so only in a summary way and join in the more extensive analysis offered by the United States in its brief filed in opposition to the Petition filed herein.

Fundamentally, *Kansas* did not involve the issue of how the United States held title to its lands. Rather, *Kansas* involved the question of whether the land owned (with restrictions on alienation) by individuals and leased to the tribe constituted "Indian Lands" within the meaning of the Indian Gaming Regulatory Act, 25 U.S.C. §2701 et seq. ("IGRA"). Under the IGRA, the land could only be "Indian lands" if the tribe exercised "jurisdiction over the property." In *Kansas,* the National Indian Gaming Commission ("NIGC") had concluded that the lands leased by the Miami Tribe of Oklahoma from landowners (who had recently been adopted into the tribe) under an agreement that the tribe could exercise jurisdiction over the land constituted "Indian lands within such tribe's jurisdiction" for the purposes of the IGRA. The central question in *Kansas* was whether the tribe's adopting the owners of the land into the tribe and then leasing the land from the landowners, who consented to the tribe's exercising jurisdiction over the land, met the requirements for demonstrating that the tribe had jurisdiction over the land for the purposes of the IGRA. The State of Kansas's challenge to the NIGC determination was clearly not one that would have affected the United States' title to the land by vesting equitable title "in others than the tribe." The challenge only addressed whether the NIGC's determination that the land was sufficiently subject to tribal jurisdiction in order to permit gaming was legally supportable. "Defendants in this case fail to appreciate the discrete concepts of land status and land title. . . . The 'interest' which the State seeks to protect in this case is not an interest in the title to real property contemplated by the QTA." *Kansas*, 249 F.3d at 1225.

In *Kansas*, the issue of title to the land never came up. All parties agreed that the land was owned by the individuals who were adopted into the tribe for the purpose of establishing that the tribe had jurisdiction over the land. Here, the situation is entirely different. Petitioners are undeniably attempting to divest the Tribe of equitable title to the land itself. Petition, p. 7. Unlike *Kansas*, the jurisdictional issue raised by Petitioners would only arise *after* a determination that the United States did not own the Shoreline in trust for the Tribe.

III.

THE COURT OF APPEALS WAS PRESENTED WITH SUFFICIENT EVIDENCE OF A COLORABLE CLAIM OF AN INTEREST IN THE SHORELINE BASED ON THE LAND'S STATUS AS INDIAN TRUST LAND

In the Questions Presented section of their Petition, Petitioners state that a secondary legal issue requiring settlement by this Court is whether the Ninth Circuit's reliance on the 1974 Solicitor's Opinion that addressed the Secretary's authority to issue the Restoration Order provides the "colorable claim" to title in the United States to invoke the provisions of the QTA. The Petitioners misstate the Ninth Circuit's opinion. The Ninth Circuit did not rely on the Solicitor's Opinion as the only basis for holding that the United States and the Tribe had a "colorable claim" to the Shoreline. Rather, the Ninth Circuit had before it the 1907 Order of the Secretary of the Interior creating the Reservation, the Parker Dam Act, in which Congress expressly recognized the existence of the Reservation, and the 1974 Restoration Order restoring the Shoreline to the equitable ownership of the Tribe. The

Ninth Circuit simply recognized that in the 1974 Solicitor's Opinion, the Solicitor opined that the Secretary had the authority to restore the Shoreline to the Tribe.

Although they raise the issue in the Questions Presented, Petitioners never actually address the question of the sufficiency of the Solicitor's Opinion as constituting a colorable claim of title. Instead, they ask the Court to overturn the Ninth Circuit's application of the "colorable claim" standard, citing *Block v. North Dakota*, 461 U.S. 273, 275, 103 S.Ct. 1811, 75 L.Ed.2d 840 (1983). *Block*, however, does not stand for the proposition for which Petitioners cite it. *Block* did not involve the Indian lands exception to the QTA. Rather, *Block* involved the statute of limitations provision of the QTA. The only reference to the cited language ("trust or [is] restricted Indian lands," Petition, p.8) is found in a footnote setting out the text of the QTA. *Block*, 461 U.S. at 275, n. 1. This can hardly be cited as a court decision setting forth a specific standard on this issue.

Petitioners argue that the "colorable claim" standard improperly prevents a suit under the Administrative Procedures Act, 5 U.S.C. §702 ("APA"). Petitioners cite no case law to support their argument. Instead they cite to a single article from the Alaska Law Review, THE NINTH CIRCUIT ERRS AGAIN: THE QUIET TITLE ACT AS A BAR TO JUDICIAL REVIEW. 19:2 Alaska Law Review 433 (2002).

Ironically, on the issue of the availability of the APA, *Block*, cited earlier by Petitioners, is in direct conflict with Petitioners' argument. The Court in *Block* expressly held that "Congress intended the QTA to provide the exclusive means by which adverse claimants could challenge the United States' title to real property." *Block*, 461 U.S. at

286. All of the Court's references to the Indian land exception in the QTA are made in the context of specifically rejecting the availability of an officer's suit as a means of evading those provisions of the QTA that restrict available claims. *Id.* at 284. The Court stated that if plaintiffs are permitted to avoid the provisions of the QTA by bringing an officer's suit, "the Indian lands exception to the QTA would be rendered nugatory." *Id.* at 284-85.

The Ninth Circuit has also held that a claimant may not circumvent the Indian lands exception to the QTA by obtaining jurisdiction under the APA. *State of Alaska v. Babbitt,* 75 F.3d 449, 453 (9th Cir. 1996) (holding officer's suit against the Bureau of Land Management was precluded by the United States' sovereign immunity under Indian lands exception to the QTA); *McIntyre v. United States*, 798 F.2d 1408, 1410-11 (9th Cir. 1986) (rejecting action brought under §702 of APA and holding that the QTA is the exclusive means to challenge government's title to real property), *rev'd on other grounds, Fadem v. United States*, 52 F.3d 202 (9th Cir. 1995); *State of Alaska v. Babbitt*, 182 F.3d 672, 674 (9th Cir. 1999) ("a plaintiff cannot avoid the Indian lands exception by obtaining jurisdiction under the Administrative Procedure Act").

As contrasted with this extensive authority determining that the APA cannot be used to avoid the QTA, petitioner's citation to a law review article is, to say the least, unconvincing.

IV.

EVEN IF THE QUIET TITLE ACT DID NOT BAR PETITIONERS' CLAIMS, THEIR CLAIMS WOULD HAVE TO BE REJECTED UNDER *MONTANA*

Petitioners maintain that, if the Court does not find that the Indian lands exception to the QTA does not divest the District Court of jurisdiction over their claims, the District Court would be compelled to find that the Chemehuevi Tribal Court lacks jurisdiction over Petitioners, citing *Montana v. United States*, 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981) ("*Montana*"). Petitioners are wrong. Even if the Court concludes that the Indian lands exception to the QTA does not bar their claims,[3] Petitioners' challenge to the Tribal Court's jurisdiction must fail because both of the exceptions to the general rule that tribal courts lack jurisdiction over non-tribal members set forth in *Montana* would apply.

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[3] Regardless of the application of the QTA, the Shoreline is owned by the United States in trust for the Tribe. As the Solicitor's Opinion makes clear, the Secretary had the authority to restore the Shoreline to the Tribe. In essence, the Secretary's power of designation was an ongoing one. Just as the Secretary could have designated more land for the Parker Dam Project had Lake Havasu risen higher than estimated, the Secretary had the authority to restore the land that was not needed for the project. 11 Op. Sol. at 2072. The Secretary clearly had the authority to review and modify the decisions of his predecessors. *West v. Standard Oil Co.*, 278 U.S. 200, 210, 49 S.Ct. 138, 73 L.Ed. 265 (1929), see also, 11 Op. Sol. at 2073, n. 2. As the Solicitor's Opinion also pointed out, it is clear that it was the intention of Congress and the Department of the Interior to take from the Tribe only those Reservation lands that were needed to create the lake. *Id.* at 2073, n. 1.

The first *Montana* exception is:

> A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.

Montana, 450 U.S. at 565.

Clearly, the present case falls within this exception. Petitioners initially entered into leases with the Tribe in 1974 pursuant to the settlement agreement ("Settlement") in *Havasu Landing, Inc., et al. v. Morton, supra*. In both the Settlement and the releases, signed by the Petitioners pursuant to the Settlement, the Petitioners waived all of their claims against the Tribe and promised never to file the legal challenge that they are making here (i.e., challenging the legality of the Restoration Order). The Court in *Montana* specifically cited leases as an example of the kind of commercial relationship that qualified for the first *Montana* exception. Thus, Petitioners entered into precisely the kind of voluntary commercial relationship described in the first *Montana* exception. The fact that Petitioners held over after the termination of their leases, refused to enter into new leases, refused to pay their rent or abide by the requirements of tribal law, and thus became trespassers, does not change the nature of the transaction. Petitioners' relationship was both consensual and commercial. There could not be a clearer example of parties submitting to the jurisdiction of a tribe under the first *Montana* exception.

The second *Montana* exception is:

> A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

Montana, 450 U.S. at 566.

"Real estate resources are the single most important economic resource of Indian tribes." (FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, 1982 Ed., p. 471 ("COHEN").) Land is also essential to the political survival of an Indian tribe. Without land, an Indian tribe exists in name only, without any meaningful jurisdiction. No sovereign would be able to exert its sovereign powers without the fundamental authority to control the use and disposition of its territory. All of the early Supreme Court decisions that laid the foundation for the present legal and political status of Indian tribes were based on a recognition of tribal rights and powers related to their territory. See, for example, *Johnson v. McIntosh*, 21 U.S. 543, 8 Wheat. 543, 5 L.Ed. 681 (1823); *Cherokee Nation v. Georgia*, 30 U.S. 1, 5 Pet. 1, 8 L.Ed. 25 (1831); *Worcester v. Georgia*, 31 U.S. 515, 6 Pet. 515, 8 L.Ed. 483 (1832).

> Federal policy from the beginning recognized and protected separate status for tribal Indians *in their own territory*. Treaties established distinct boundaries between tribal territory and the areas open to white settlement, trade and other federal laws were enacted to control white entry, settlement, trade and other activities on tribal lands. The tribes governed their own internal

> matters, reflecting the general rule of international law that the international laws of acquired territories continue in force until repealed or modified by the new sovereign.

COHEN at p.28 (emphasis added).

Indian tribes have survived in this country because the ownership and control of their lands provided tribal members with a place to live and a resource that, at least ostensibly, allowed for a subsistence existence. Later, for some tribes, the tribal lands provided a foundation for economic development. Without the ownership and control of their lands, Indian tribes would not have survived to the present day. Because of the importance of land to Indian tribes, numerous federal statutes have been passed that restrict the alienation of Indian land and that require federal approval of the sale or leasing of Indian land. See, e.g., Nonintercourse Act, 25 U.S.C. §177; 25 U.S.C. §81; Indian Leasing Statute, 25 U.S.C. §415. These statutes were made necessary by the clearly hostile attitude taken by individuals and states toward Indian tribes and their sovereignty over their land, which included state participation in the stealing of Indian land. *United States v. Kagama*, 118 U.S. 375, 384-385, 6 S.Ct. 1109, 30 L.Ed. 228 (1886).

Nothing could be more essential to "the political integrity, the economic security, or the health or welfare of the tribe" than the preservation of a tribe's land base. As the Court of Appeals stated in *Crow Tribe v. Montana*, 650 F.2d 1104, 1117 (9th Cir. 1981): "Any substantial incursion into the revenues obtained from the sale of the Indians' land-based wealth cuts to the heart of the Tribe's ability to sustain itself."

The present dispute revolves entirely around the ability of the Tribe to control the use of its land and its land-based resources. Petitioners occupied tribal land after the termination of their leases, refused to enter into new leases for the use of that land, refused to abide by the laws of the Tribe relating to the use of tribal land, refused to acknowledge the sovereignty of the Tribe over the Tribe's land, and refused to even pay rent to the Tribe for the land that they occupied. This is nothing less that an effort to dispossess the Tribe of portions of its land base, which truly "cuts to the heart of the Tribe's ability to sustain itself." The present case clearly falls under the second *Montana* exception.

Based on the foregoing analysis, there can be no question that the Tribal Court's exercise of jurisdiction over the Petitioners was a legitimate exercise of the Tribe's inherent sovereign power[4] under the Court's decision in *Montana*.

V.

PETITIONERS ARE ESTOPPED TO DENY THE TRIBE'S TITLE, AND THEIR CLAIMS BASED ON SUCH A CHALLENGE MUST BE REJECTED

Petitioners, as tenants in possession of tribal land at the time that this lawsuit was filed, cannot challenge the

[4] The Tribal Court's exercise of jurisdiction over the Petitioners was also a legitimate exercise of Congressionally delegated authority under the Indian Reorganization Act, 25 U.S.C. §475 ("IRA"). In the IRA, Congress expressly delegated to tribes, such as the Chemehuevi, who are organized under the Act, the authority to prevent the "sale, disposition, lease and encumbrance" of its lands. *Id.*

Tribe's title: " . . . a tenant in possession is estopped to deny his landlord's title to the leased property." Restatement (Second) of Property (Landlord and Tenant) §4.3 cmt. b. (1976).

> Tenants are never allowed to deny the title of their landlord, . . . the rule being that whenever the possession is acquired under any species of tenancy, whether the action be assumpsit, debt, covenant, or ejectment, the tenant is estopped from denying the title of the landlord.

Williams v. Morris, 95 U.S. 444, 5 Otto 444, 24 L.Ed. 360 (1877). See also, *Richardson v. Van Dolah*, 429 F.2d 912 (9th Cir. 1970).

Petitioners' claims are based upon their challenge to the Tribe's title to the land restored to the Tribe by the Restoration Order. Without a successful challenge to that title, there is no foundation for their claims. Because they are estopped to challenge that title, Petitioners' Petition must be denied.

VI.

PETITIONERS' CLAIMS ARE BARRED BY THE DOCTRINE OF UNCLEAN HANDS

It is a basic principle of equity that he who seeks equity must come to the court with clean hands.

> This maxim is far more than a mere banality. It is a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant. That doctrine is rooted in the historical concept of

> court of equity as a vehicle for affirmatively enforcing the requirements of conscience and good faith. This presupposes a refusal on its part to be 'the abetter of iniquity.'

Precision Instrument Mfg. Co. v. Automotive Maintenance Machinery Co., 324 U.S. 806, 814, 65 S.Ct. 993, 89 L.Ed. 1381 (1945).

Petitioners came before the District Court seeking a variety of equitable relief. They sought an order from the District Court: 1) requiring the Tribal and Federal Respondents to produce a Title Status Report for the Reservation lands at issue in this case; 2) enjoining Tribal Respondents from enforcing the provisions of the Tribe's Unlawful Detainer Ordinance; 3) enjoining proceedings before the Tribal Court in the eviction actions against Petitioners; and 4) declaring that the Parker Dam Act constituted a diminishment of the Reservation. Petitioners, however, came before the District Court and come before this Court with unclean hands, and equity should be denied to them.

As discussed above, a group of plaintiffs, including Petitioners, entered into the Settlement to settle the claims raised in *Havasu Landing, Inc., v. Morton*, *supra*. In the Settlement, Petitioners specifically agreed to never challenge the Tribe's title to the land at issue in this case. The recitals to the Settlement state:

> The Lawsuit, among other things, challenges the legality and constitutionality of an Order of the Acting Secretary of the Interior, John C. Whitaker, dated August 15, 1974 (the "Order"), which corrected a 1941 designation of certain

> lands by Interior Secretary Ickes and determines, establishes and confirms that the Chemehuevi Tribe has full equitable title to all lands within the Chemehuevi Indian Reservation riparian to Lake Havasu, all as further set forth in the Order.

Under the terms of the Settlement, the Petitioners released the Tribe and the United States, and their officers, employees, successors, trustees, and assigns from all claims:

> arising out of, in connection with or in any way related to, or which may hereafter be claimed to arise out of or in connection with or relate to, the subject matter of the Lawsuit, the Order, the Havasu Concession Contract or the Permits.

Petitioners executed releases of claims arising out of the same litigation. In those releases, Petitioners again agreed never to challenge the Tribe's title to the land at issue in this case. Each release specifically stated that the plaintiff released and discharged the Tribe and the United States, and their officers, agents, employees, successors, trustees and assigns from all claims arising out of or related to, among other things:

> (b) The Order of the Acting Secretary of the Interior, John C. Whitaker, dated August 15, 1974, which corrects a 1941 designation of certain lands by Interior Secretary Ickes and determines, establishes and confirms that the Tribe has full equitable title to all lands within the Chemehuevi Indian Reservation riparian to Lake Havasu, all as further set forth in such Order;
> . . .

By bringing the lawsuit and filing this Petition, Petitioners are in breach of the Settlement Agreement and the accompanying release. Thus, though they seek equity, Petitioners come to the Court "tainted with inequitableness [and] bad faith relative to the matter" in which they seek relief.

CONCLUSION

Petitioners have not raised any issue that meets the criteria for Supreme Court review under Rule 10. There is no conflict between the Ninth and Tenth Circuits with regard to the application of the Indian lands exception to the Quiet Title Act. Petitioners' arguments can be summarily disposed of, as they are clearly meritless.

For all of the foregoing reasons, the Tribal Respondents respectfully request that Petitioners' Petition for Writ of Certiorari be denied.

Dated: April 21, 2003

Respectfully submitted,

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In the Supreme Court of the United States

GORDON B. SAUCERMAN, ET AL., PETITIONERS

v.

GALE NORTON, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

The Secretary of the Interior has issued an order confirming that the United States holds title to certain shoreline lands, previously designated as part of the Parker Dam Project, in trust for the Chemehuevi Indian Tribe. The question presented is:

Whether the principle of sovereign immunity bars a suit, not authorized by the Quiet Title Act, 28 U.S.C. 2409a, seeking a declaration that the shoreline lands are not owned by the United States in trust for the Tribe.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is reproduced at 51 Fed. Appx. 241. The opinion of the district court (Pet. App. 6a-17a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 19, 2002. On February 13, 2003, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including March 19, 2003, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners brought this suit seeking to establish that the United States does not hold title, on behalf of the Chemehuevi Indian Tribe, to certain shoreline lands adjacent to Lake Havasu that petitioners were, at one time, entitled to occupy under now-expired federal permits. The United States District Court for the District of Arizona dismissed the action on sovereign immunity grounds, because the Quiet Title Act (QTA), 28 U.S.C. 2409a, does not authorize suits disputing title to "trust or restricted Indian lands." 28 U.S.C. 2409a(a). See Pet. App. 6a-17a. The court of appeals affirmed. *Id.* at 1a-5a.

1. The Chemehuevi Indian Tribe is a federally-recognized Indian Tribe, organized under Section 16 of the Indian Reorganization Act, 25 U.S.C. 476. *Chemehuevi Indian Tribe* v. *California State Bd. of Equalization*, 757 F.2d 1047, 1050 n.1 (9th Cir.), rev'd on other grounds, 474 U.S. 9 (1985). "Since time immemorial, the Chemehuevi Indian Tribe has resided in the Chemehuevi Valley desert along the Colorado River, in the area that is now part of the Chemehuevi Indian Reservation." 757 F.2d at 1050. In *Arizona* v. *California*, 373 U.S. 546 (1963), this Court ruled that the United States had reserved water for the Chemehuevi and other Indian reservations along the Colorado River at the time of their creation, *id.* at 595-601 & n.97, and the Court rejected the argument that the reservations were invalid because they were originally established by Executive Order, *id.* at 598.

The controversy in this case had its genesis in the Parker Dam Project Act of July 8, 1940, ch. 552, 54 Stat. 744, which authorized the Secretary of the Interior to designate for government use those lands within the

Chemehuevi Indian Reservation that were needed for construction of the Parker Dam Project. On November 25, 1941, the Secretary designated lands within the Reservation below the 465-foot contour line for that purpose. Pet. App. 7a. After construction of the dam, the lake level rose only to the 450-foot contour line, leaving a strip of shoreline above the lake level. *Ibid.* As a result, the Chemehuevi Tribe not only lost its valuable bottom lands beneath Lake Havasu, but also lost valuable riparian lands adjacent to the newly created lake. To address that inequity, the Secretary issued an order on November 1, 1974, correcting the 1941 designation, and confirming that "[t]he Chemehuevi Tribe has full equitable title to all those lands within the Chemehuevi Indian Reservation designated to be taken by Secretary Ickes in 1941" that lay between the 450-foot and the 465-foot contour. See Tribal Respondents' Supp. C.A. E.R. (TRSER) Tab 24, at 11.

Between 1941 and 1974, the Department of the Interior had issued a number of site use permits and concessions to non-Indians, pursuant to which petitioners or their predecessors had placed various cabins and other structures on the shoreline area. In 1974, homeowners associations representing non-Indian permit holders on the shoreline filed suit to challenge the validity of the secretarial order. *Havasu Landing, Inc.* v. *Morton*, No. 74-3565 (C.D. Cal.). The parties in *Havasu Landing* entered into a settlement agreement in 1976, under which the permit holders were allowed to renew their permits, in some cases until 1990, and in return released the Tribe and the United States from all claims of any kind relating to the 1974 order restoring the land to the Reservation. TRSER Tab 33, at 95-106.

2. Petitioners remained in the cabins until 1990, but refused thereafter to enter into new leases with the Tribe or acknowledge the Tribe's equitable title to the shoreline area. Notwithstanding the 1976 settlement agreement, former permittees filed an action in 1992 seeking a declaration that the shoreline area was not part of the Reservation but was instead under the jurisdiction of the Bureau of Reclamation. *Havasu Landing Homeowners Ass'n* v. *Lujan*, No. 92-6184 (C.D. Cal. Oct. 15, 1992). The district court concluded in that action that the former permittees' claims were barred because they fell within the Indian lands exception of the QTA, 28 U.S.C. 2409a(a), and the court of appeals affirmed that decision. *Havasu Landing Homeowners Ass'n* v. *Babbitt*, No. 94-55842, 1996 WL 21598, at *1 (9th Cir. Jan 22, 1996) (74 F.3d 1245 (Table)).

The court of appeals found that the the QTA's Indian lands exception barred the former permittees' attempt to seek a judicial determination "of the *capacity* in which the United States holds title to the property." 1996 WL 21598, at *1. The court held that the government need only show a "colorable claim" that the land is held in trust for an Indian Tribe to invoke the exception, and it found that the government had made such a showing. *Id.* at *2. The court also held that the QTA bar could not be avoided by pleading the suit as an "officer's suit" or a suit under the Administrative Procedure Act (APA). *Id.* at *3 (citing *Block* v. *North Dakota*, 461 U.S. 273, 284-286 (1983)). The former permittees nevertheless continued to refuse to consummate leases with the Tribe.[1]

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[1] The United States brought ejectment actions against some residents, not including petitioners, who had declined to enter into new leases with the Tribe. *United States* v. *Jorgensen*, 92-3809

3. On November 17, 2000, the Chemehuevi Tribe filed a complaint against a number of former permittees, including petitioners, in the Chemehuevi Tribal Court. Pet. App. 7a. The complaint alleged that those individuals were trespassing on reservation land in violation of tribal and federal law, and it requested ejectment and damages. TRSER Tab 33, at 29 *et seq.* Petitioners failed to appear in tribal court, and default judgments were entered against them. Pet. App. 8a.

4. On January 31, 2001, petitioners filed this action for declaratory and injunctive relief. Pet. App. 8a. The complaint named as defendants the Secretary of the Interior and other Department officials, as well as the Chemehuevi Tribal Council and tribal officials. The complaint acknowledged that petitioners had signed a release in 1976 as part of the settlement in *Havasu Landing Inc.* v. *Morton* (Compl. para. 40), but alleged that the release was "void because it violates public policy" (*id.* para. 42). See TRSER Tab 1. As in the previous action in *Havasu Landing Homeowners Association* v. *Babbitt*, petitioners challenged the propriety of the 1974 secretarial order. Pet. App. 8a-9a. The complaint sought "production of the entire administrative record regarding the Secretarial Orders of

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(C.D. Cal.). The district court ordered ejectment, and the Ninth Circuit affirmed. *United States* v. *Jorgensen*, No. 93-55296, 1997 WL 355849, at *1 (June 27, 1997) (116 F.3d 1487 (Table)). The *Jorgensen* defendants claimed, *inter alia*, that the Tribe had been forever divested of title to the shoreline area by the Secretary's 1941 designation. The court of appeals declined to address the issue of the extent of the Chemehuevi Reservation, pointing out that a tenant in an eviction action is estopped from challenging his landlord's title. *Id.* at *1. Contrary to petitioners' suggestion (Pet. 7), the court in *Jorgensen* in no way suggested that the shoreline area was not part of the Reservation; it did not reach that issue.

1974" and a declaration that the Parker Dam Act of 1940 and the payment of compensation for the lands acquired by that Act constituted a diminishment of the Reservation. Compl. paras. V.1., V.4. Petitioners also sought an injunction against the tribal court eviction action on grounds that the court allegedly did not have jurisdiction over them. *Id.* para. V.3.

On July 6, 2001, the district court granted defendants' motions to dismiss for lack of subject matter jurisdiction. The court first ruled, consistent with an earlier order denying a temporary restraining order, see Federal Appellees' Supp. C.A. E.R. (FASER) Tab 47, that petitioners had failed to exhaust tribal court remedies before proceeding to federal court. Pet. App. 11a-12a. The court next concluded that, even had petitioners not failed to exhaust tribal court remedies, their suit would be barred by sovereign immunity because it sought a declaration that the land at issue was not held in trust by the United States for the benefit of the Tribe. *Id.* at 12a-13a. Such an "attempt to divest the Tribe of their equitable title to the land," the court reasoned, falls within the QTA's Indian lands exception. *Id.* at 13a. The court concluded that the United States had, at the very least, a "colorable claim" that the land is part of the Reservation and that the Secretary was therefore entitled to invoke the Indian land exception to the QTA's waiver of immunity. *Id.* at 13a-14a.[2]

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[2] The district court also noted that petitioners' complaint presented "serious res judicata problems" because it raised issues that were the subject of the 1976 settlement and that were resolved on the merits against former permittees in *Havasu Landing Homeowners Ass'n* v. *Babbitt*, *supra*. Pet. App. 16a-17a n.2. The court did not need to resolve those issues, however, because it found that the suit was barred on other grounds.

5. The court of appeals affirmed in an unpublished memorandum. Pet. App. 1a-5a. That court, like the district court, concluded that petitioners' suit was barred in light of the QTA's Indian lands exception because the effect of their challenge, if it were successful, would be to divest the Tribe of equitable title to the shoreline lands. *Id.* at 2a-5a. The court of appeals did not reach or discuss the additional obstacles—namely, the res judicata effect of the 1976 settlement and the 1992 litigation and petitioners' failure to exhaust tribal remedies—that also barred petitioners' suit.

ARGUMENT

The court of appeals correctly concluded that the Quiet Title Act's Indian lands exception, 28 U.S.C. 2409a(a), bars petitioners from proceeding with this lawsuit. The court's unpublished decision does not conflict with any decision of this Court or of any other court of appeals. Further review is accordingly not warranted.

1. Petitioners' suit is the most recent of several actions by persons who occupied lands adjacent to Lake Havasu before 1974. Petitioners seek to litigate whether the United States holds legal title to the shoreline lands in trust for the Chemeheuvi Indian Tribe, notwithstanding the Secretary of the Interior's 1974 order confirming that the Tribe has equitable title to those lands. Petitioners assert here (Pet. 10), as they have in prior actions, that the Secretary lacked authority to issue that order and should accordingly be required to treat the area as public lands rather than reservation lands held in trust for the Tribe. Petitioners' claim is not actionable for a series of reasons.

First, petitioners are parties to the 1976 settlement agreement whereby they released all claims relating to

the 1974 secretarial order in return for the ability to renew their temporary use permits until 1990. That settlement, by itself, is sufficient, under principles of res judicata, to bar relitigation of the issues they resolved there and renew here. See Pet. App. 15a, 16a-17a n.2. See generally *Arizona* v. *California*, 530 U.S. 392, 413-416 (2000).

Second, petitioners raised their challenge to the Tribe's ownership of the shoreline area in an attempt to enjoin the enforcement of eviction orders entered in a tribal court proceeding in which petitioners failed to appear. As the district court explained, petitioners are barred from proceeding in the federal court by their failure to raise the question of the Tribe's jurisdiction over the shoreline in the tribal court. Pet. App. 11a-12a. This Court has stated that federal courts, in deference to "tribal self-government and self-determination," should refrain from considering challenges to a tribal court's exercise of jurisdiction over a case until the challenge has been considered by the tribal court itself. *Iowa Mut. Ins. Co.* v. *LaPlante*, 480 U.S. 9, 15 (1987); *National Farmers Union Ins. Co.* v. *Crow Tribe*, 471 U.S. 845 (1985).

Third, petitioners brought this suit against federal officials to challenge whether title to the shoreline area is held by the United States in trust for the Tribe. The United States has not waived its sovereign immunity to this claim. The court of appeals properly affirmed the district court's judgment dismissing the case on that ground.

Congress has provided the QTA as the exclusive means for adjudicating disputes with the United States over title to real property. See *Block* v. *North Dakota*, 461 U.S. 273, 284-286 (1983). The QTA expressly states that "[t]he United States may be named as a party

defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest." 28 U.S.C. 2409a(a). The QTA further provides, however, that "[t]his section does not apply to trust or restricted Indian lands." 28 U.S.C. 2409a(a). As this Court explained in *Mottaz* v. *United States*, 476 U.S. 843 (1986), "when the United States claims an interest in real property based on that property's status as trust or restricted Indian lands, the Quiet Title Act does not waive the Government's immunity." *Ibid.* The Court recognized in *Mottaz* that Congress enacted the QTA's Indian lands exception "to prevent abridgment of 'solemn obligations' and 'specific commitments' that the Federal Government had made to the Indians regarding Indian lands." *Id.* at 843 n.6. "A unilateral waiver of the Federal Government's immunity would subject those lands to suit without the Indians' consent." *Ibid.* (citing H.R. Rep. No. 1559, 92d Cong., 2d Sess. 13 (1972)).

This Court ruled in *Block* v. *North Dakota*, that a plaintiff cannot circumvent the QTA's limitations on the waiver of sovereign immunity by framing its suit as an action under some other federal law. 461 U.S. at 286. Consistent with that principle, this Court and lower courts have found that suits against the United States attacking the trust status of land are barred by reason of the QTA's Indian lands exception, even if the suits are styled as actions under the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, or other federal laws. See *Metropolitan Water Dist.* v. *United States*, 830 F.2d 139, 143 (9th Cir. 1987) (APA action challenging Interior Secretary's determination of reservation boundary barred by Indian lands exception to QTA), aff'd by equally divided court *sub nom. California* v. *United States*, 490 U.S. 520 (1989); *Department of*

Bus. Regulation v. *United States Dep't of the Interior*, 768 F.2d 1248 (11th Cir. 1985) (suit purporting to challenge Secretary's decision to take land into trust barred where effect of suit would be to divest Tribe of trust property), cert. denied, 475 U.S. 1011 (1986); *Alaska* v. *Babbitt*, 38 F.3d 1068, 1074 (9th Cir. 1994) (APA suit attacking trust status of land barred); *Spaeth* v. *United States Sec'y of the Interior*, 757 F.2d 937, 942 (8th Cir. 1985) (APA did not provide consent to suit against United States seeking to adjudicate disputed title to Indian real property in which United States claims interest).[3]

Petitioners argue for a different result based on the Tenth Circuit's decision in *Kansas* v. *United States*, 249 F.3d 1213 (2001), but their reliance on that case is misplaced. In *Kansas*, the State challenged a decision of the National Indian Gaming Commission that a tract of land in Kansas under lease to the Miami Tribe of Oklahoma constituted "Indian lands within such tribe's jurisdiction" for purposes of certain provisions of the Indian Gaming Regulatory Act (IGRA). *Id.* at 1218 (quoting from 25 U.S.C. 2710(b)). As the Tenth Circuit pointed out, "Indian lands" is defined in the IGRA as

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[3] If the United States does not "claim[ ] an interest in real property based on the property's status as trust or restricted Indian lands" then the Indian lands exception does not apply. *Mottaz*, 476 U.S. at 843 (exception not applicable where "the United States claims an interest in the Leech Lake lands, not on behalf of Indian beneficiaries of a trust, but rather on behalf of the United States Forest Service and the Chippewa National Forest"). In this case, however, the United States indisputably claimed an interest in the real property at issue based on the property's status as Indian trust land, as reflected in the 1974 Secretarial Order confirming the Chemehuevi Tribe's equitable title to those lands. Pet. App. 3a-4a.

"any lands title to which is * * * held by any Indian tribe or individual subject to restriction by the United States against alienation *and over which an Indian tribe exercises governmental power.*" 25 U.S.C. 2703(4)(emphasis added). The issue in *Kansas* was not the status of title, but instead whether the Tribe in that case exercised governmental power over off-reservation land. In finding that the QTA did not apply, the court of appeals emphasized that "[a] determination that a tract of land does or does not qualify as 'Indian lands' within the meaning of IGRA in no way affects title to the land." 249 F.3d at 1225. Instead, "[t]his is a dispute between federal, tribal, and state officials as to which sovereign has authority over the tract. The tract's owners are not even a party to this suit." *Ibid.* (citation omitted).

Here, in contrast, petitioners sued federal officials and the Tribe to obtain a ruling that the United States does not hold title to the lands at issue in trust for the Tribe. As the district court noted (Pet. App. 8a), the complaint clearly framed this case as a direct challenge to the Secretary of the Interior's 1974 determination to confirm equitable title to the shoreline area in the Tribe. This case, unlike *Kansas*, accordingly involves a dispute over title to real property in which the United States claims an interest. The United States plainly has a colorable claim that equitable title rests with the Tribe, based on the 1974 Secretarial Order. The Indian lands exception to the QTA applies and precludes petitioners' suit.[4]

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[4] This case bears no similarity to other cases petitioners cite, such as *South Dakota* v. *Bourland*, 508 U.S. 679 (1993), and *Montana* v. *United States*, 450 U.S. 544 (1981). In those cases, the Court examined the scope of tribal jurisdiction over lands within

2. Petitioners argue (Pet. 8-10) that the court of appeals erred by requiring only a "colorable" claim that the land at issue is "trust or restricted Indian lands" for purposes of the QTA's Indian lands exception. That argument is without merit. A requirement that the United States prove that the lands at issue are, in fact, trust or restricted Indian lands before the Indian lands exception could be invoked would defeat the purpose of that exception, which is intended to preserve the United States' immunity from suit. The courts have therefore required only a showing of a "colorable claim" that the lands in question are trust or restricted lands. *Wildman* v. *United States*, 827 F.2d 1306, 1309 (9th Cir. 1987); *Metropolitan Water Dist.* v. *United States*, 830 F.2d at 144; *Alaska* v. *Babbitt*, 75 F.3d 449, 451-452 (9th Cir. 1995), cert. denied, 519 U.S. 818 (1996); *Shivwits Band of Paiute Indians* v. *Utah*, 185 F. Supp. 2d 1245, 1251 (D. Utah 2002). Petitioners cite no decisions to the contrary.

3. Finally, petitioners argue (Pet. 10-12) that no waiver of sovereign immunity is needed for a court to determine the trust status of land. Petitioners cite several cases in which courts have determined whether a Tribe had jurisdiction over particular lands (Pet. 11-12), but none of the cases was a suit against the United States. The United States is not subject to suit in the absence of a waiver of sovereign immunity. In the case of suits contesting title, Congress has determined to provide only a limited waiver. Where, as here, the United States asserts a colorable claim that the land in question is part of reservation lands held in trust for an

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reservations that were not held in trust for the Tribes. Furthermore, because the United States was not a defendant in those suits, those cases presented no issue of sovereign immunity.

Indian Tribe, that waiver is not available. Petitioners' suit was therefore properly dismissed.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 02-1393

In the

Supreme Court of the United States

GORDON B. SAUCERMAN; JOE BENJAMIN; SHARRON BENJAMIN; CLEO FREEMAN,

Petitioner,

v.

GALE NORTON, Secretary of the Interior; KEVIN GOVER, Assistant Secretary for Indian Affairs; ELUID MARTINEZ, Commissioner of Reclamation; WAYNE NORDWALL, Phoenix Area Director for Bureau of Indian Affairs; JANET WONG, Staff Solicitor; WAYNE SUMATZKUKU, Bureau of Indian Affairs Realty Specialist; WILLIAM TITCHYWY, ALLEN ANSPACH; CHEMEHUEVI TRIBAL COUNCIL; ROBERT MOELLER; EDWARD SMITH; DAVID CHAVEZ;; CHEMEHUEVI TRIBAL COUNCIL; DAVID CHAVEZ; EDWARD SMITH; ROBERT MOELLER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

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STATEMENT

Petitioners brought this suit in the Federal District Court for Arizona after receiving eviction notices from the Chemehuevi Tribal Court. The following additional facts are in reply to the statements made in the Briefs in Opposition.

1. As the United States admits, the Secretary of Interior on behalf of the Chemehuevi Indian Tribe has actively reasserted tribal sovereignty over the entire area taken by the Parker Dam Act of 1940, 54 Stat. 744, based on this Court's ruling in *Arizona v. California*, 373 U.S. 546 (1963). U.S. Br.Opp. 2. This reassertion of tribal sovereignty began in 1974 and initially culminated in the Settlement Agreement of 1976 which was based on a Secretarial Restoration Order of August 15, 1974 that expressly protected the valid existing rights of the petitioner cabin owners.

2. After 1990, the Chemehuevi Tribe asserted that the equitable title of the shoreline was restored to them under a November 1, 1974 Secretarial Order. According to the representations the Chemehuevi Tribe has made regarding the contents of the November 1, 1974 Secretarial Order, no rights were recognized as existing in the cabin owners. This is the position taken in this case by the Chemehuevi Tribe and Secretary of Interior. Tribal Br.Opp. 3, U.S.Br.Opp. 3. Counsel for petitioners has never seen a complete draft of a November 1, 1974 Secretarial Order.

The Chemehuevi Tribe took this same position in their application for a trust patent still pending before the Bureau of Land Management (BLM). The BLM officially requested a copy of the November 1, 1974 Secretarial Order from the Office of the Secretary of the

Interior. The Office responded in writing that they do not have any Secretarial Order of that date for the Chemehuevi Indian Tribe. The BLM has issued a draft trust patent which includes the valid existing rights of the petitioners to their cabins. The Chemehuevi Tribe has not accepted the draft trust patent.

As was pointed out to the Ninth Circuit, the United States never cites the November 1, 1974 order using its own citation form of either an order number or federal register page and date. Every time the United States cites the November 1, 1974 Order it is by citing the Tribe citing the Order. U.S. Br. Opp. 3.

3. The Chemehuevi Tribal Court papers petitioners were served denied them the right to challenge the jurisdiction of the tribal court over them based on the purported Secretarial Restoration Order of November 1, 1974. The papers stated that the non-Indians could not be represented by counsel in tribal court. Further, the Chemehuevi Tribal Court Clerk refused to provide the required court forms to any of the non-Indian defendants. The non-Indian defendants were informed that any answers or motions not filed on the appropriate forms would not be accepted. Supp.Tr. Complaint 11-12.

All of this was presented and discussed before the Federal District Court at which time Tribal Counsel stated that the non-Indians would be allowed to present their arguments in tribal court represented by counsel. The non-Indians were given the opportunity to challenge the jurisdiction of the tribal court over them in proceedings before the Tribal Court Judge. However, no copy of a November 1, 1974 Secretarial Order was ever submitted to the tribal court. The November 1, 1974 Order was accepted as existing from affidavits of Tribal Officials testifying to its contents. Before the Ninth Circuit ruled on the appeal, tribal court remedies had been completely exhausted and the Chemehuevi Tribal

Court Order denying the Motion for Reconsideration of the Default Judgments was filed with the Clerk of the Ninth Circuit by Motion to Take Judicial Notice.

4. After 1990, the Chemehuevi Tribe did offer leases to the petitioner cabin owners which were based on the purported November 1, 1974 Secretarial Order requiring the non-Indians to consent to full tribal jurisdiction and relinquish all rights to their cabins. No lease according to the terms of the Settlement Agreement or Secretarial Order of August 15, 1974 was ever offered by the Chemehuevi Tribe to the non-Indian petitioners. Petitioners would gladly have paid rent to the Chemehuevi Tribe if leases that protected their rights under the terms of the Settlement Agreement had been offered.

5. Neither the Chemehuevi Tribe or United States deny petitioners's statement that the cabins are located on the designated flood and seep zone right of way of the reclamation project. Nor does the United States deny that the Ninth Circuit ruled in *United States v. Jorgensen*, No. 93-55296, 1997 WL 355849, *1 (June 27, 1997) (116 F. 3d 1487(Table)), that the shoreline was federal land.

ARGUMENT

The United States and Chemehuevi Indian Tribe in their Response Briefs in Opposition to the Petition for Certiorari argue that the rationale of *Metropolitan Water District of Southern California v. United States*, 830 F. 2d 139 (9th Cir. 1987), *aff'd sub. nom. California v. United States*, 490 U.S. 920 (1989) should be upheld by this Court to divest these non-Indians of any constitutional right to challenge the jurisdiction of the Chemehuevi Tribal Court over them in the courts of the United States. Both spend many pages attempting to

support the Secretary's position of reasserting tribal sovereignty over the shoreline. The Ninth Circuit Opinion does not cite to either purported Secretarial Order but holds exclusively on the Solicitor's Opinion of August 15, 1974 as creating a "colorable claim" sufficient in the Secretary to divest the subject matter jurisdiction of the federal courts under the Indian exception to the Quiet Title Act, 28 U.S.C. §2409a(a). App. 3a-4a.

1. The Secretary of Interior's mere assertion of the sovereign prerogative of the Chemehuevi Indian Tribe over these non-Indians is enough under the Ninth Circuit's *Metropolitan Water District* rationale to divest the federal courts of jurisdiction to protect the non-Indians civil rights in a federal court against the Secretary and the Chemehuevi Tribe. App. 4a-5a. The Ninth Circuit's *Metropolitan Water District* rationale is based on the discretionary authority of the Secretary of Interior as interpreted in *Arizona v. California*, 373 U.S. 546, 597-8 (1963) to enforce the Indian Tribes' sovereignty using the full sovereign powers of the United States contained in the Commerce Clause, Art. I, Sec. 8, Cl.1 and Property Clause, Art.IV, Sec.3, Cl.2 of the Constitution as trustee for the tribe under any colorable claim a solicitor can make.

Accordingly, the United States asserts under *Arizona v. California*, 530 U.S. 392, 413-416 (2000), that the Settlement Agreement of 1976 has *res judicata* effect against these petitioners. The United States does not specify which Secretarial Order of 1974 was the basis of the 1976 Settlement Agreement. U.S. Br. Opp. 7-8. The Brief in Opposition of the United States only cites the purported Secretarial Order of November 1, 1974, and then generically cites a 1974 Secretarial Order thereafter. U.S. Br. Opp. 3. The United States never cites the August 15, 1974 Secretarial Order which was the order consented to by petitioners in the Settlement Agreement and accepted by the federal court. Pet. 4, Tr.

Br. Opp. 20-21. According to *Arizona v. California*, 530 U.S. 392, 411-413 (2000) the Settlement Agreement is not entitled to *res judicata* effect when the United States is substituting the purported November 1, 1974 Secretarial Order for the August 15, 1974 Secretarial Order because that would make the November 1, 1974 Order a final boundary determination of the Chemehuevi Indian reservation not subject to judicial review contrary to this Court's earlier ruling in 1983. Despite the subsequent rulings in *Arizona v. California*, the United States in this case is still asserting the absolute discretionary authority of the Secretary to reallocate the shoreline as against all individual private rights under the 1963 ruling as cited above.

The Ninth Circuit's rationale in *Metropolitan Water District* and *Wildman v. United States*, 827 F.2d 1306 (9th Cir. 1987) represents the complete breakdown of the ability to enforce the laws of Congress and of judicial review predicted by the three dissenting Justices in 1963 in *Arizona v. California*. As summarized in the partial dissent of Justice Harlan, Justice Douglas and Justice Stewart:

"The delegation of such unrestrained authority to an executive official raises, to say the least, the gravest constitutional doubts. *See Schecter Poultry Corp. v. United States*, 295 U.S. 495; *Panama Refining Co. v. Ryan*, 293 U.S. 388; *cf. Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587-589. The principle that authority granted by the legislature must be limited by adequate standards serves two primary functions vital to preserving the separation of powers required by the Constitution. First, it insures that the fundamental policy decisions in our society will be made not by an appointed official but by the body immediately responsible to the people. Second, it prevents judicial review from becoming merely an exercise at large by

providing the courts with some measure against which to judge the official action that has been taken.

The absence of standards under the Court's construction is an instructive illustration of these points. The unrestrained power to determine the burden of shortages is the power to make a political decision of the highest order. Indeed, the political pressures that will doubtless be brought to bear on the Secretary as a result of this decision are disturbing to contemplate. Furthermore, whatever the Secretary decides to do, this Court will surely be unable effectively to review his actions, since it will not know what guides were intended by Congress to govern those actions." *Arizona v. California*, 373 U.S. 546, 626 (1963).

The dissenting Justices failed to foresee that the "unrestrained power to determine the burden of shortages" was granting the Secretary a separate trust responsibility to reallocate any and all resources the solicitor's office by its own opinion deemed to be under the Secretary's discretionary authority. Even though the shoreline lands are not held in trust status under any law of the United States, both the Chemehuevi Tribe and United States claim throughout their Briefs in Opposition that the shoreline lands are held in trust for the Chemehuevi Indian Tribe. The only trust is the one created by the Lindgren Opinion of August 15, 1974 as the Ninth Circuit has held. App. 3a-4a. The Lindgren Solicitor's Opinion reinterprets the Parker Dam Act as a continuing discretionary grant of authority to the Secretary instead of as a diminishment act as Congress intended. Tr. Br. Opp. 2-3.

2. This Court in *Montana v. United States*, 450 U.S. 544 (1981) applied judicial review to the additional land claim brought by the Secretary of the Interior on behalf of Crow tribal sovereignty to protect the rights of non-Indians and the jurisdiction of the State of Montana. *Montana v. United States* with its test for determining

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tribal jurisdiction over non-Indians is founded on the equity jurisdiction of this Court.

The Petition for Certiorari is the law argument of how the *Montana* test should apply to this case. The Petition cites *South Dakota v. Bourland*, 508 U.S. 679 (1993), as being on point for this case and asserts that the shoreline of Lake Havasu is a flood and seep zone right of way. Petitioners did not extend the application of *Bourland* into the equity determination made in *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), that tribal lands which are a right of way are not to be treated as "Indian lands" under the test of tribal jurisdiction contained in *Montana*. Petitioners sought to avoid a direct equity jurisdiction confrontation between the land status element of *Montana* and the Secretary's absolute authority to designate the land status for one of the five Tribes of *Arizona v. California*. Pet. 11.

The United States in its Response states "petitioners brought this suit against federal officials to challenge whether title to the shoreline area is held by the United States in trust for the Tribe." U.S. Br. Opp. 8. Their definition of these lands being "trust or restricted Indian lands" for purposes of the Indian exception to the Quiet Title Act, 28 U.S.C. 2409a(a) is completely based on the authority of the Secretary to reallocate the shoreline as asserted in the Lindgren Solicitor's Opinion as discussed above.

This Court has reasserted its equity jurisdiction in numerous cases using the *Montana* analysis. Pet.10-12. This Court has also had numerous cases where it has subjugated its equity jurisdiction to the discretionary authority of the Secretary using the *Arizona v. California* analysis. *National Farmers Union Ins. Co v. Crow Tribe*, 471 U.S. 845 (1985), *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987). U.S. Br. Opp. 8. *Metropolitan Water Dist. v. United States*, 830 F.2d 139 (9th Cir. 1987), aff'd by equally divided court *sub nom.*

California v. United States, 490 U.S. 920 (1989). U.S. Br. Opp 9. This Court has preserved what effectively are contradictory case lines of federal Indian common law.

Petitioners argue that the Tenth Circuit in *State of Kansas v. United States*, 249 F.3d 1213 (10th Cir. 2001), in preventing the United States from *presupposing* that the land is *de jure* "Indian lands" solved the dispute between the application of the *Montana* test and the Secretary's asserted discretionary authority to designate trust land status for Indian Tribes. Pet. 6-7. Petitioners do not believe that this case requires this Court to reason any further to protect the constitutional rights of these petitioners.

3. In March of this year, this Court began defining the "Indian trust" as a matter of federal common law using its equity jurisdiction. *United States v. Navajo Nation*, 537 U.S. _____, 123 S Ct. 1079 (2003); *United States v. White Mountain Apache Tribe*, 537 U.S. _____, 123 S Ct. 1126 (2003). How these decisions affect the Secretary's discretionary trust authority to assert an additional land claim against previously acknowledged valid existing private rights was not addressed.

This Court in *Inyo County v. Paiute-Shoshone Indians of the Bishop Community*, 538 U.S. ____ (May 19, 2003) has finally confronted the issue of federal courts being used to pursue tribal sovereignty to divest state jurisdiction and the rights and law attached to state jurisdiction. By limiting an Indian tribes' right to sue using 42 U.S.C. § 1983 to break state sovereign immunity in a federal court, this Court recognizes the federalism problem created by tribal sovereignty being extended in the federal courts. More importantly, the Court recognized the problem created by Indian tribes having the right to sue without themselves being subject to suit. This is the equity problem facing these petitioners.

These petitioners alleged reverse racial discrimination against officials of the United States and Chemehuevi tribal officials using 42 U.S.C. §1983 and 42 U.S.C. §1985 to challenge the complete deprivation of their due process and equal protection rights in the federal courts. Supp. Tr. Complaint 22-25. Do they have any right to prevent the Secretary (federal government) from encroaching on their private rights?

The United States and Chemehuevi Tribe argue that these non-Indians have no rights capable of enforcement in federal court under *Arizona v. California*, and its progeny *Wildman* and *Metropolitan Water District* and that this should remain the federal common law of Indian affairs. Petitioners are before this Court to request equal justice under law.

CONCLUSION

The petition for writ of certiorari should be granted.

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